No. 06-969
Vide 06-970

(27)

Title: Federal Election Commission, Appellant
v.
Wisconsin Right to Life, Inc.

Docketed: January 12, 2007
Lower Ct: United States District Court for the District of Columbia
Case Nos.: (04-1260)
Decision Date: December 21, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Dec 29 2006	Motion (06M58) of appellee Wisconsin Right to Life, Inc. to expedite the appeal filed.
Jan 3 2007	MOTION (06M58) DISTRIBUTED for Conference of January 5, 2007.
Jan 3 2007	Response to motion (06M58) from appellants Senator John McCain, et al. filed. (Distributed)
Jan 4 2007	Response to motion (06M58) from appellant Federal Election Commission filed. (Distributed)
Jan 12 2007	Statement as to jurisdiction filed. (Response due February 12, 2007)
Jan 12 2007	Appendix of Federal Election Commission filed.
Jan 15 2007	Response to jurisdictional statement from appellee Wisconsin Right to Life, Inc. filed. VIDED.
Jan 16 2007	DISTRIBUTED for Conference of January 19, 2007.
Jan 19 2007	Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits. This case is consolidated with No. 06-970 and a total of one hour is allotted for oral argument. The briefs of appellants are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, February 23, 2007. The brief of appelles is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, March 23, 2007. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Wednesday, April 18, 2007. VIDED
Feb 5 2007	SET FOR ARGUMENT ON Wednesday, April 25, 2007.
Feb 20 2007	Consent to the filing of amicus briefs in support of either party or neither party received from counsel for McCain, Bladwin, Shays and Meehan. VIDED.
Feb 22 2007	Brief amici curiae of Norman Dorsen, et al. filed. VIDED.
Feb 23 2007	Joint appendix filed. VIDED (Distributed)
Feb 23 2007	Brief of appellant Federal Election Commission filed. VIDED (Distributed)
Feb 23 2007	Brief amici curiae of Richard Briffault and Richard L. Hasen filed. VIDED. (Distributed)
Feb 23 2007	Brief amici curiae of League of Women Voters of the United States, et al filed. VIDED. (Distributed)
Feb 23 2007	Brief amici curiae of Committee for Economic Development, et al. filed. VIDED.
Feb 26 2007	CIRCULATED.
Mar 2 2007	Record received from U.S.D.C. for District of Columbia Circuit. (1 envelope). Additional documents are electronically filed.
Mar 7 2007	Motion for divided argument filed by appellant Federal Election Commission. VIDED.
Mar 7 2007	Application (06A863) of appellee to file the brief on the merits in excess of page limits,

	submitted to The Chief Justice. VIDED.
Mar 9 2007	Application (06A863) to file in excess of page limits granted by The Chief Justice. The brief may not exceed 70 pages. VIDED.
Mar 21 2007	Brief of appellee Wisconsin Right to Life, Inc. filed. VIDED. (Distributed)
Mar 21 2007	Brief amicus curiae of American Civil Liberties Union filed. VIDED. (Distributed)
Mar 23 2007	Brief amicus curiae of Alliance for Justice filed. VIDED. (Distributed)
Mar 23 2007	Brief amicus curiae of American Federation of Labor and Congress of Industrial filed. VIDED. (Distributed)
Mar 23 2007	Brief amicus curiae of Chamber of Commerce of the United States of America filed. VIDED. (Distributed)
Mar 23 2007	Brief amicus curiae of American Center for Law and Justice and of Focus on the Family filed. VIDED. (Distributed)
Mar 23 2007	Brief amicus curiae of Republican National Committee filed. VIDED. (Distributed)
Mar 23 2007	Brief amicus curiae of National Association of Realtors filed. VIDED. (Distributed)
Mar 23 2007	Brief amicus curiae of National Rifle Association filed. VIDED. (Distributed)
Mar 23 2007	Brief amicus curiae of Coalition of Public Charities filed. VIDED. (Distributed)
Mar 23 2007	Brief amici curiae of Family Research Council, et al. filed. VIDED. (Distributed)
Mar 23 2007	Brief amicus curiae of United States Senator Mitch McConnell filed. VIDED. (Distributed)
Mar 23 2007	Brief amici curiae of Citizens United, et al. filed. VIDED. (Distributed)
Mar 23 2007	Brief amici curiae of Center for Competitive Politics, et al. filed. VIDED.
Apr 2 2007	Motion for divided argument filed by the Solicitor General GRANTED.
Apr 18 2007	Reply of appellant Federal Election Commission filed. VIDED. (Distributed)
Apr 25 2007	Argued. For appellant in No. 06-969: Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C. For appellants in No. 06-970: Seth P. Waxman, Washington, D.C. For appellee: James Bobb, Jr., Terre Haute, Ind.
Apr 26 2007	Letter from counsel for appellants McCain, et al. received. (Distributed). VIDED

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No.

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, APPELLANT

v.

WISCONSIN RIGHT TO LIFE, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

LAWRENCE H. NORTON
General Counsel

RICHARD B. BADER
Associate General Counsel

DAVID KOLKER
Assistant General Counsel

HARRY J. SUMMERS
Attorney
Federal Election Commission
Washington, D.C. 20463

PAUL D. CLEMENT
Solicitor General
Counsel of Record

GREGORY G. GARRE
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the three-judge district court erred in holding that the federal statutory prohibition on a corporation's use of general treasury funds to finance "electioneering communications" is unconstitutional as applied to three broadcast advertisements that appellee proposed to run in 2004.

PARTIES TO THE PROCEEDINGS

The Federal Election Commission is the appellant in this Court and was the original defendant in the three-judge district court.

Wisconsin Right to Life, Inc., is an appellee in this Court and was the plaintiff in the district court.

The following individuals intervened as defendants in the district court: United States Senator John McCain, United States Representative Tammy Baldwin, United States Representative Martin Meehan, and United States Representative Christopher Shays.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the three-judge district court (App. 1a-48a) is not yet reported. Prior opinions of the district court (App. 55a-56a, 57a-71a) are unreported.

JURISDICTION

The decision of the three-judge district court was issued on December 21, 2006. On December 28, 2006, the district court issued an order stating that the December 21 order was "a final appealable order as to those issues decided in the opinion accompanying that order," and that there was "no just reason to delay an appeal." App. 51a. The Federal Election Commission timely filed a notice of appeal on December 29, 2006. App. 53a-54a. The intervenor defendants filed a notice of appeal on the same day. The jurisdiction of this Court is invoked under the Bipartisan Campaign Reform Act

of 2002 (BCRA), Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114.

STATEMENT

This case concerns the constitutionality of the "electioneering communication" provision contained in Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91. The provision prohibits corporations, labor unions, and national banks from using their general treasury funds to pay for any "electioneering communication," defined as a communication that refers to a candidate for federal office and is broadcast within the 30 days before a federal primary election or the 60 days before a federal general election in the jurisdiction in which that candidate is running. BCRA § 203, 116 Stat. 91 (2 U.S.C. 441b(b)(2) (Supp. IV 2004)). In *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003), this Court sustained the constitutionality of BCRA § 203 against a facial challenge.

Appellee filed suit in federal district court, arguing that BCRA's restrictions on the financing of "electioneering communications" are unconstitutional as applied to three broadcast advertisements that appellee had proposed to run in 2004. The three-judge district court concluded that appellant's claim was foreclosed by *McConnell* and accordingly dismissed the complaint. App. 55a-56a; see App. 57a-71a. This Court reversed, clarifying that BCRA § 203 is subject to as-applied challenges of this nature. See *Wisconsin Right to Life, Inc.* v. *FEC*, 126 S. Ct. 1016, 1018 (2006) (*WRTL I*) (per curiam). On remand, the district court held by a divided decision that BCRA § 203 is unconstitutional as applied to the 2004 advertisements and granted summary judgment to appellee. App. 1a-48a.

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(a)(8) and (d) (Supp. IV 2004); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. a. Federal law has long prohibited both for-profit and nonprofit corporations from using their general treasury funds to finance contributions and expenditures in connection with federal elections. See *FEC* v. *Beaumont*, 539 U.S. 146, 152-154 (2003). The FECA makes it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). However, the FECA permits a corporation to establish a "separate segregated fund," commonly called a political action committee or PAC, to finance those disbursements. 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. IV 2004). The fund "may be completely controlled" by the corporation, and it is "separate" from the corporation "'only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982) (quoting *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 414 (1972)). The fund may solicit and accept donations voluntarily made for

political purposes by the corporation's stockholders or members and its employees, and the families of those individuals. 2 U.S.C. 441b(b)(4)(A)-(C). The money in a corporation's separate segregated fund can be contributed directly to candidates for federal office, and it may be used to pay for independent expenditures to communicate to the general public the corporation's views on such candidates.

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) *(MCFL)*, this Court held that Section 441b's prohibition on the use of corporate treasury funds to finance independent expenditures for campaign-related speech could not constitutionally be applied to a corporation that (1) was "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and [had a] policy not to accept contributions from such entities." *Id.* at 264; see *McConnell*, 540 U.S. at 210; 11 C.F.R. 114.10 (implementing the *MCFL* exception). Corporations possessing the characteristics identified in that case are commonly referred to as "*MCFL* organizations." See, *e.g.*, *McConnell*, 540 U.S. at 210.

The Court in *MCFL* also adopted a narrowing construction of 2 U.S.C. 441b even as applied to corporate entities that do not qualify as *MCFL* organizations. In interpreting Section 441b's prohibition of corporate "expenditure[s]," the Court noted that the FECA definition of "expenditure" encompassed "the provision of anything of value made 'for the purpose of influencing any election for Federal office.'" *MCFL*, 479 U.S. at 245-246 (quoting 2 U.S.C. 431(9)(A)(i)) (emphasis omit-

ted). To avoid problems of vagueness and overbreadth, the Court construed Section 441b's prohibition of independent expenditures from corporate treasuries to reach only the financing of communications that expressly advocate the election or defeat of a clearly identified candidate. *Id.* at 248-249; see 2 U.S.C. 431(17) (pre-BCRA law). The Court had previously introduced the concept of express advocacy in *Buckley* v. *Valeo*, 424 U.S. 1, 43-44, 77-80 (1976), when it narrowly construed other FECA provisions regulating independent campaign expenditures. *Buckley* provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n.52.

b. Based on its assessment of evolving federal campaign practices following numerous hearings, Congress subsequently determined that, "[w]hile the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *McConnell*, 540 U.S. at 126. In the wake of *Buckley*, corporations and labor unions crafted political communications that avoided the so-called magic words of electoral advocacy and financed those communications with "hundreds of millions of dollars" from their general treasuries. *Id.* at 127. Indeed, even the advertisements aired by federal candidates themselves rarely included express exhortations to vote for or against a particular candidate. See *id.* at 127 & n.18, 193 & n.77. "[T]he conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *Id.* at 127.

"Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at

194. BCRA § 203 amended 2 U.S.C. 441b(b) to bar any corporation or union from paying for an "electioneering communication" with money from its general treasury. 2 U.S.C. 441b(b)(2) (Supp. IV 2004). The term "electioneering communication" is defined in pertinent part as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; (2) is made within 60 days before a general election, or within 30 days before a primary election for the office sought by the candidate; and (3) is "targeted to the relevant electorate." BCRA § 201(a), 116 Stat. 88 (2 U.S.C. 434(f)(3)(A)(i) (Supp. IV 2004)).[1] The prohibition on the use of corporate funds for electioneering communications does not apply to "*MCFL* organizations." See *McConnell*, 540 U.S. at 209-211. A corporation or union remains free, moreover, to establish a separate segregated fund and to pay for electioneering communications from that fund. See 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. IV 2004).

3. Three years ago, in *McConnell*, this Court upheld against a facial constitutional challenge BCRA § 203's ban on the use of corporate or union treasury funds for electioneering communications. See 540 U.S. at 203-209.

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[1] BCRA excludes from the definition of "electioneering communication" "(i) a communication appearing in a news story, commentary, or editorial distributed through" a broadcasting station; (ii) a communication that is an expenditure or independent expenditure under the Federal Election Campaign Act; (iii) a candidate debate or forum; and (iv) any other communications the Commission exempts by regulation, consistent with certain requirements. BCRA § 201(a) (2 U.S.C. 434(f)(3)(B)(i)-(iv) (Supp. IV 2004)). The definition also does not encompass print communications such as billboards, newspaper and magazine advertisements, brochures, and handbills, and it does not cover telephone or Internet communications. See *McConnell*, 540 U.S. at 207.

The Court observed that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view * * * [BCRA § 203] as a 'complete ban' on expression rather than a regulation." *Id.* at 204 (quoting *Beaumont*, 539 U.S. at 162); see *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990). "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *McConnell*, 540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 163). The Court also noted that its campaign-finance jurisprudence reflects "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (citations and internal quotation marks omitted).

The Court in *McConnell* further held that the compelling governmental interests that support the requirement that corporations finance express advocacy through a PAC apply equally to corporate financing of electioneering communications. 540 U.S. at 206. Based on its examination of the record before the district court, the Court concluded that the "vast majority" of prior advertisements encompassed by BCRA's definition of the term "electioneering communications" were intended to influence electoral outcomes. *Ibid.* The Court further observed that, "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Ibid.*

4. Appellee Wisconsin Right To Life, Inc., is a nonprofit, nonstock Wisconsin corporation. App. 2a. Appel-

lee's amended complaint asserted that the corporation is tax-exempt under Section 501(c)(4) of the Internal Revenue Code (26 U.S.C.), and that it was organized to protect "individual human life from the time of fertilization until natural death." Amended Compl. paras. 20, 22; see App. 57a. Appellee asserted that it does not qualify for any exception that would permit it to finance electioneering communications with corporate funds, alleging in particular that it is not a "qualified nonprofit corporation" under 11 C.F.R. 114.10, which implements the *MCFL* exception. See App. 3a n.2, 58a. Appellee maintains a PAC for election-related activity. App. 58a.

United States Senator Russell Feingold of Wisconsin, a Democrat, ran for reelection in 2004. App. 58a. "In March 2004, [appellee's] PAC endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority." *Ibid.* "In a news release on July 14, 2004, [appellee] criticized Senator Feingold's record on Senate filibusters against judicial nominees." *Ibid.* On July 26, 2004, appellee began to use its corporate treasury funds to finance the airing of three broadcast advertisements critical of the filibusters that identified Senator Feingold, as well as Senator Kohl, who was not up for reelection, by name. App. 3a-6a, 60a; see App. 66a-71a (text of advertisements).

5. On July 28, 2004, appellee filed suit against the FEC in federal district court, alleging that BCRA's prohibition on the use of corporate treasury funds for "electioneering communications" as defined in the Act is unconstitutional as applied to the three specific broadcast advertisements and any "materially similar ads" that appellee might seek to run in the future. App. 7a. Appellee sought a preliminary injunction barring enforce-

ment of the statute against it. *Ibid.* Because Senator Feingold was a candidate for reelection in 2004, appellee "anticipate[d] that its ongoing advertisements [would] be considered electioneering communications for purposes of federal statutory and regulatory definitions * * * during the period between August 15, 2004 and November 2, 2004." App. 59a. A three-judge district court was convened pursuant to BCRA § 403(a)(1), 116 Stat. 114.

The district court denied appellee's request for a preliminary injunction. App. 57a-71a. In holding that appellee had not established a substantial likelihood of success on the merits, the district court construed this Court's decision in *McConnell* to foreclose as-applied challenges of the sort brought by appellee in this case. App. 61a. The district court further stated that the specific facts of this case "suggest that [appellee's] advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." App. 62a. The court explained:

> In *McConnell*, the Court voiced the suspicion of corporate funding of broadcast advertisements just before an election blackout season because such broadcast advertisements "will *often* convey [a] message of support or opposition" regarding candidates. Here, [appellee] and [appellee's] PAC used other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did [appellee] switch to broadcast media. This followed the PAC endorsing opponents seeking to unseat a candidate whom [appellee]

> names in its broadcast advertisements, and the PAC announcing as a priority "sending Feingold packing."

App. 62a-63a (citations omitted). The district court subsequently dismissed appellant's complaint in an unpublished memorandum opinion and order. App. 55a-56a.

6. In *WRTL I*, this Court vacated the judgment of the district court, stating that *McConnell* "did not purport to resolve future as-applied challenges" to BCRA § 203. 126 S. Ct. at 1018. The Court noted the district court's statement, in its opinion denying preliminary injunctive relief, that appellee's "advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Ibid.* The Court found it unclear, however, whether the district court had intended that statement as an alternative ground for its decision. *Ibid.* The Court remanded the case to the district court to consider the merits of appellee's as-applied challenge in the first instance. *Ibid.*

7. On remand, four individual Members of Congress were granted leave to intervene as defendants. App. 9a. By a divided vote, the three-judge district court subsequently entered summary judgment for appellee, holding that BCRA § 203 is unconstitutional as applied to the three advertisements that appellee had proposed to run during the 2004 election cycle. App. 1a-48a.[2]

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[2] On August 25, 2006, appellee filed a motion for a preliminary injunction against enforcement of BCRA § 203 with respect to a new advertisement that appellee planned to run within the 60-day period before the 2006 general election. On September 7, 2006, the district court denied that motion. On September 21, 2006, appellee moved for summary judgment with respect to the 2006 advertisement. In response, the FEC filed a motion under Federal Rule of Civil Procedure 56(f) on October 4, 2006. Those motions remain pending in the district court. See App. 15a n.15.

a. The district court began by considering its jurisdiction to address appellee's constitutional challenges. Specifically, the court held that appellee's as-applied challenge with respect to the 2004 advertisements remained justiciable because the challenge fell within the exception to mootness principles for claims that are "capable of repetition, yet evading review." App. 12a; see App. 11a-15a. With regard to the "evading review" prong of that exception, the district court found it "entirely unreasonable, if not fanciful, to expect that [appellee] could have obtained complete judicial review of its claims in time for it to air its ads during the 30 and 60-day periods leading up to federal primary and general elections * * * in 2004." App. 13a. With respect to the "capable of repetition" prong, the district court concluded that, "[w]hile [appellee's] intention to run genuine issue advertisements during future BCRA blackout periods is not enough to sustain its generalized claim regarding 'grassroots lobbying advertisements,' it is enough to create a reasonable expectation that it will be subject to the same action again." App. 14a-15a (internal quotation marks omitted).

At the same time, however, the court held that it lacked jurisdiction to consider appellee's "generalized lobbying claim" because that claim was "unripe." App. 16a. That claim "feature[d] a prophylactic challenge to what [appellee] anticipates to be the prohibition by the FEC of its broadcasting 'materially similar' ads in future election contests." App. 15a. The court held that this challenge was "too speculative and thus not sufficiently concrete to state a cognizable claim under Article III." App. 16a; see App. 15a-16a.

b. On the merits, the district court stated that resolution of appellee's as-applied challenge required a "two-

step analysis of the ads in question." App. 17a. In the first step, the court sought to determine whether the 2004 advertisements were "express advocacy or its functional equivalent." *Ibid.* The court explained that, if the advertisements fit that characterization, "that would be the end of the challenge because [this] Court in *McConnell* upheld BCRA's authority to regulate [such advertisements]." *Ibid.*

In conducting the first step of its inquiry, the district court agreed with appellee that "the judicial assessment of the ads should be limited to a facial evaluation of the ads' language and images." App. 18a; see App. 19a-22a. Accordingly, the court stated that it would

> limit its consideration to language within the four corners of the anti-filibuster ads that, at a minimum: (1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of legislative scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate.

App. 22a. Based on its analysis of those factors, see App. 23a-24a, the district court concluded that, "on their face, [appellee's] three 2004 anti-filibuster advertisements were not intended to influence the voters' decisions," App. 24a (internal quotation marks omitted), and that the advertisements therefore were "not the functional equivalent of express advocacy," App. 25a.

At the second step of its analysis, the district court considered whether the government had established a state interest sufficient to justify regulation of appellee's advertisements. App. 25a-29a. The court stated that, "[b]y permitting as-applied challenges to section 203's constitutionality, * * * [this] Court has now put in play the question it left open in *McConnell* as to whether the government interests that justify regulating express advocacy and its functional equivalent also apply to the regulation of genuine issue ads." App. 26a-27a. The district court held that the interests supporting restrictions on corporate financing of express electoral advocacy are inapposite here. App. 27a-28a. The court stated that,

> while it may be theoretically possible to craft a genuine issue ad so subtly that it subconsciously encourages (or discourages) a potential voter to support a political candidate, there is no evidentiary or common sense basis to believe that such facially neutral ads are *necessarily* intended to affect an election, or will *necessarily* be viewed as such.

Ibid. The court also dismissed Congress's interest in establishing a "bright-line rule" for determining what qualifies as an "electioneering communication" subject to regulation under BCRA. App. 28a. Because the district court found no compelling government interest in regulating appellee's 2004 advertisements, the court declined to "address whether [appellee] could/should have pursued other options for the financing of its advertisements or altered the content of its ads so as to avoid BCRA section 203's regulation altogether." App. 29a n.24.

c. Judge Roberts dissented from the district court's grant of partial summary judgment to appellee. App. 30a-48a. He found the court's refusal to look beyond the four corners of the 2004 advertisements to be inconsistent with this Court's decision in *McConnell* and with the district court's own rulings at earlier stages of this case. See App. 30a, 34a-40a. He explained that "[a] purpose and effect-based inquiry seems necessary to determine if [appellee's] ads are genuine issue ads or are instead express or sham issue advocacy because the 'presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.'" App. 36a-37a (quoting *McConnell*, 540 U.S. at 193). Judge Roberts concluded that, "[b]ecause a contextual analysis is warranted and discloses deep factual rifts between the parties concerning the purpose and intended effects of the ads, neither side is entitled to judgment as a matter of law." App. 30a. In particular, Judge Roberts stated that "[a] genuine issue of material fact exists as to whether [appellee's] 2004 advertisements were intended to influence a Senate election, or to spark litigation, or to be genuine issue ads." App. 47a.

d. On December 28, 2006, on the FEC's motion, the district court clarified that its December 21 order was "a final, appealable order as to those issues decided in the [accompanying] opinion," and that the court found "no just reason to delay an appeal." App. 51a; see Fed. R. Civ. P. 54(b); BCRA § 403(a)(3), 116 Stat. 114.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The divided district court has declared BCRA's restrictions on corporate financing of "electioneering communications" unconstitutional as applied to the advertisements at issue here. This case presents issues of

substantial and recurring importance concerning the framework for determining whether BCRA § 203 is unconstitutional as applied to particular advertisements falling within the statutory definition of "electioneering communication." Congress has vested this Court with exclusive jurisdiction to review any "final decision" of a district court in a suit brought pursuant to BCRA's special judicial-review provision. The FEC and the regulated public need guidance from this Court as to the proper framework for considering as-applied challenges to BCRA § 203. The Court should therefore note probable jurisdiction over the appeal in this case.[3]

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[3] Appellee does not assert a continuing intent to broadcast the particular advertisements that were the subject of the district court's as-applied analysis. Based on that fact, the intervenor-defendants argued in the district court (after the case was remanded by this Court) that appellee's suit is no longer justiciable because no live controversy remains. The FEC took no position on that issue below. The district court held that appellee's suit remains justiciable under the "capable of repetition, yet evading review" exception to mootness principles. See App. 11a-15a; p. 11, *supra*. In doing so, the district court disagreed with the mootness analysis of the district court in *Christian Civic League of Maine, Inc.* v. *FEC*, No. 06cv0614 (D.D.C. Sept. 27, 2006) (*CCLM*), juris. statement pending, No. 06-589 (filed Oct. 26, 2006). See App. 14a n.14.

In the FEC's motion to dismiss or affirm in *CCLM*, the FEC argues (at 15-23) that the distinct as-applied challenge to BCRA § 203 presented in that case is moot, and that the "capable of repetition, yet evading review" exception is inapplicable because, based on several circumstances, there is no reasonable prospect that CCLM will again become a party to the same controversy. As that motion explains (at 27-28), that case and this one present distinct mootness issues in light of the different circumstances involved in the *CCLM* litigation. See *id.* at 17-23. However, the better view appears to be that this dispute, at least as framed by the district court, is moot as well. Although appellee has alleged in general terms that it "intends to run materially similar grass-roots lobbying ads" in the future, App. 16a; see App. 2a, 15a-16a,

1. BCRA § 403(a)(1) states that a suit challenging the constitutionality of any provision of the statute "shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court." 116 Stat. 114. Pursuant to that provision, a three-judge district court was convened in this case. BCRA § 403(a)(3) states that a "final decision" in such a suit "shall be reviewable only by appeal directly to" this Court. 116 Stat. 114.

In the instant case, the district court issued an opinion and order on December 21, 2006, granting appellee's motion for summary judgment and holding that BCRA § 203 is unconstitutional as applied to the advertisements that appellee had proposed to run in 2004. See App. 1a-48a, 49a-50a. The court subsequently clarified that the December 21 order was a "final appealable order as to those issues decided in the [accompanying] opinion," and that the court found "no just reason to delay an appeal." App. 51a. Pursuant to Federal Rule of Civil Procedure 54(b), the district court's December 21 opinion and order is therefore a "final decision" within the meaning of BCRA § 403(a)(3), and this Court is vested with exclusive appellate jurisdiction over the instant appeal.

2. The district court's decision is erroneous for several reasons, including the following:

a. Confining its inquiry to the four corners of appellee's 2004 advertisements, the district court observed

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appellee has not demonstrated that it is likely to run advertisements having the specific characteristics that the district court found dispositive here, see App. 22a. In any event, the mootness issue can be addressed in the briefing on plenary review. If the Court were to determine that appellee's action is moot, it should vacate the judgment below and remand with instructions to dismiss.

that "the language in [appellee's] advertisements does not mention an election, a candidacy, or a political party, nor do they comment on a candidate's character, actions, or fitness for office." App. 23a. The court concluded that, "on their face, [appellee's] three 2004 anti-filibuster advertisements were not intended to influence the voters' decisions." App. 24a (internal quotation marks omitted). Congress crafted the BCRA definition of "electioneering communication," however, in direct response to the demonstrated inadequacy of the prior "express advocacy" test. See *McConnell*, 540 U.S. at 126-129, 193-194; pp. 5-6, *supra*. That definition represents Congress's considered effort, based on the substantial experience of its Members as participants in the political process and on evidence obtained through numerous hearings on the matter, to identify through objective criteria a class of communications that are generally intended to influence electoral outcomes and are likely to have that effect. In exempting an indeterminate subset of "electioneering communications" from the financing restrictions imposed by BCRA § 203, the district court improperly substituted its judgment for that of Congress with respect to the inferences to be drawn from the timing and content of appellee's advertisements.

b. The district court found "no evidentiary or common sense basis to believe" that communications having the characteristics of appellee's 2004 advertisements "are *necessarily* intended to affect an election, or will *necessarily* be viewed as such." App. 27a-28a. Contrary to the court's suggestion, however, it was not the government's burden to prove, in this as-applied challenge, that the generalization on which BCRA's "electioneering communication" provisions are based "necessarily"

holds true in this case. This Court in *McConnell* upheld BCRA § 203 against a facial constitutional challenge, see 540 U.S. at 203-209, and it recognized that the "vast majority" of pre-BCRA advertisements "that clearly identified a candidate and were aired during [the 30- and 60-day preelection timespans]" had an electioneering purpose, *id.* at 206. To establish its entitlement to a constitutional exemption from BCRA § 203's financing restrictions, appellee bore the burden of demonstrating (at least) that the generalization reflected in BCRA's definition of "electioneering communication" actually does *not* hold true here.

That allocation of burdens is consistent with prior decisions of this Court that have sustained as-applied challenges to other provisions of the campaign-finance laws. In *Buckley*, for example, the Court held that the FECA's disclosure provisions are constitutional on their face and as applied to minor parties generally. See 424 U.S. at 64-74. The Court noted, however, that a particular minor party could establish a meritorious as-applied constitutional challenge by demonstrating "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassments, or reprisals." *Id.* at 74. When the Court later addressed such an as-applied challenge in *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), it followed *Buckley* and based its decision on the party's "proof of specific incidents of private and government hostility toward the [minor party] and its members." *Id.* at 99.

The Court in *MCFL* employed a similar mode of analysis. The defendant corporation in that case argued that FECA's ban on the use of corporate treasury funds to finance express electoral advocacy (see p. 3, *supra*)

was unconstitutional as applied to the defendant's own campaign-related expenditures. Although this Court ruled in the corporation's favor, the Court did not suggest that the government bore the burden of proving that MCFL's campaign spending would actually cause the problems at which the statutory prohibition is directed. Rather, the Court held the statute unconstitutional as applied only after concluding that the corporation's expenditures would *not* cause those problems—*i.e.*, that "the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL." 479 U.S. at 263; see *id.* at 264 (identifying specific attributes of MCFL that "ensure[d]" that the organization's election-related spending would not implicate the policy rationales underlying the FECA ban on corporate campaign expenditures).

Placing the burden of proof on the party seeking a constitutional exemption from a facially valid law is especially appropriate in the present context because BCRA § 203 imposes relatively minor burdens on corporate speakers who do not seek to influence federal elections. As the Court in *McConnell* observed, "corporations and unions may finance genuine issue ads during [pre-election] timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U.S. at 206. Thus, even if a particular corporation actually lacks the intent to influence federal elections but is unable to establish that fact with sufficient clarity to meet its burden of proof, it will suffer no substantial impairment of its ability to engage in issue advocacy. The district court, however, expressly refused to take into account the availability of those alternatives in conducting its constitutional analysis. See App. 29a n.24.

c. As Judge Roberts explained in dissent, App. 41a-45a, a substantial body of evidence in this case—including but not limited to the text of the 2004 advertisements and materials directly referenced in those advertisements—suggests that the advertisements were intended at least in part to affect electoral outcomes or could have that effect. The district court in denying appellee's request for a preliminary injunction had previously relied on that evidence in concluding that appellee's 2004 advertisements "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." App. 62a. In granting appellee's motion for summary judgment, however, the court misconstrued the text of the 2004 advertisements and improperly declined to consider any evidence outside the advertisements' four corners. App. 19a-22a. The court relied in part on the practical concern that "as-applied challenges, to be effective, must be conducted during the expedited circumstances of the closing days of a campaign when litigating contextual framework issues and expert testimony analysis is simply not workable." App. 19a-20a. The court also stated that "delving into a speaker's subjective intent is both dangerous and undesirable when First Amendment freedoms are at stake." App. 20a-21a. At the same time, however, the court declined to look at the advertisements' likely effect, independent of the speaker's intent. App. 24a-25a. The net effect of the court's unwillingness to look beyond the face of the advertisements and its inquiry into whether they were "necessarily" intended to influence an election is essentially to ask, in the context of an as-applied challenge, whether the advertisements were on their face incapable of being valid issue advertisements. That cannot be the correct inquiry.

To be sure, an entirely unstructured inquiry, in which the court in each as-applied challenge must hear and evaluate *all* potentially relevant evidence to ascertain the corporate advertiser's subjective intent, would reintroduce the indeterminacy that Congress and this Court have specifically sought to dispel in this important context. Minimizing such indeterminacy promotes First Amendment values and thus provides a compelling reason for adhering as strictly as possible to the bright-line definition drawn by Congress and upheld on its face by this Court. But the district court failed to explain how the infeasibility of determining appellee's actual intent could justify declaring BCRA § 203 unconstitutional as applied when the provision has already been upheld against a facial challenge. In any event, the district court offered no sound explanation for ignoring other evidence that (1) tends to confirm the generalization on which BCRA's definition of "electioneering communication" is based and (2) is readily ascertainable and capable of objective measurement, even within the context of "expedited" litigation in the closing days before an election.

For example, appellee in this case began to run its anti-filibuster broadcast advertisements in July 2004, "days after the last of the judicial filibuster cloture votes had occurred during that session and the Senate had departed for a six-week recess." App. 43a (Roberts, J., dissenting). Appellee "did not run any additional anti-filibustering ads after the 2004 election in either 2004 or 2005 during the height of the [filibuster] controversy." *Ibid.* (citations omitted). Appellee's effort to finance the advertisements was thus limited to the 2004 campaign season, even though public controversy over the filibustering of judicial nominees continued (and indeed gained

greater prominence) during the months following the election.

BCRA's definition of the term "electioneering communication," which is limited to advertisements broadcast during the 30- and 60-day periods before federal primary and general elections, reflects Congress's judgment that the timing of advertisements that mention a federal candidate is an important indicator of the speaker's intent. In discussing the use of purported "issue" advertisements during the pre-BCRA period, this Court in *McConnell* likewise recognized that "the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." 540 U.S. at 127. The district court nevertheless refused to consider what inferences might be drawn from the timing of appellee's advertisements.[4]

The district court also treated as irrelevant the fact that appellee had frequently and explicitly opposed Senator Feingold's 2004 reelection effort through other communications. See App. 41a-43a (Roberts, J., dissent-

---

[4] Of course, an as-applied challenge to BCRA § 203 can by definition arise only with respect to advertisements to which that provision applies—*i.e.*, broadcast advertisements aired or sought to be aired during the pre-election periods defined by the statute. In this case, however, the relevant "timing" evidence goes well beyond the fact that appellee proposed to broadcast its anti-filibustering advertisements during those pre-election windows. Appellee commenced its advertising campaign at a time when Congress was out of session, and it abandoned its efforts after the election occurred, even though public controversy over the filibustering of judicial nominees reached its height during the spring of 2005. Those facts cast serious doubt on any contention that the pre-election timing of the advertising campaign was simply fortuitous.

ing). "Senator Feingold's participation in judicial filibustering was a particular focus of criticism by [appellee], which distributed a voter guide endorsing one of Feingold's opponents who pledged to allow judicial nominees an up or down vote." App. 42a (Roberts, J., dissenting). The district court concluded that, unless a particular communication was itself subject to regulation under BCRA, the existence of the communication would have "no bearing" on the resolution of appellee's as-applied constitutional challenge. App. 23a n.18. Appellee's pattern of electoral advocacy during the 2004 campaign, however, is directly relevant to the question whether the generalization on which BCRA § 203 is based—*i.e.*, Congress's determination that advertisements falling within the BCRA definition of "electioneering communication" will typically reflect an intent to affect electoral outcomes—has been proved by appellee to be inaccurate in this case.[5]

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[5] In discussing the sorts of pre-BCRA advertisements that were intended to influence federal elections but avoided words of express advocacy, the Court in *McConnell* observed that "[l]ittle difference existed * * * between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-127. The Court thus treated an appeal to citizens to contact their elected representative, when targeted to the relevant electorate and issued during the 30- and 60-day periods preceding federal primary and general elections, as a *paradigmatic* example of the advertisements that BCRA's "electioneering communication" provisions were intended to address. Appellee's 2004 advertisements differed from the "Jane Doe" hypothetical in that they contained no explicit criticism of Senator Feingold's record on the issue of judicial filibusters. See App. 19a. The significance of that omission is sharply reduced, however, by the fact that appellee was simultaneously engaged in other communications that *did* disparage Senator Feingold's record on that issue.

As a final example of the district court's unwillingness to look beyond the four corners of the advertisements—despite a recognition that the ultimate test focused on the advertisements' purpose, and not just their effect, see App. 24a-25a—the court refused to consider the content of the website that the advertisements urged the audience to contact. See App. 22a n.18. That refusal is particularly striking because one of the five aspects of the advertisements that the court scrutinized was whether the advertisements "exhort[ed] the listener to do anything other than contact the candidate about the described issue." App. 22a. Here, the advertisements exhorted listeners and viewers to visit appellee's website, which in turn featured "e-alerts" excoriating Senator Feingold on the filibuster issue. App. 41a (Roberts, J., dissenting).

3. The divided district court's decision in this case purports to establish a framework for future as-applied challenges to the financing restrictions that apply to "electioneering communications" under BCRA § 203. The district court's mode of analysis is seriously flawed. Restrictions on corporate financing of "electioneering communications" are a critical component of the campaign-finance reform that Congress enacted in BCRA, and this Court has declared those restrictions to be constitutional on their face. See *McConnell*, 540 U.S. at 204-207.

This Court's guidance is needed to establish the appropriate scope and contours of as-applied challenges to BCRA § 203 and to ensure that the framework for adjudicating such challenges does not have the practical effect of vitiating BCRA § 203 altogether. Under a proper inquiry, BCRA § 203's financing restrictions may constitutionally be applied to the advertisements at issue in

this case. At a minimum, however, the current record does not support the district court's grant of summary judgment in favor of appellee with respect to those advertisements.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

GREGORY G. GARRE
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

LAWRENCE H. NORTON
General Counsel

RICHARD B. BADER
Associate General Counsel

DAVID KOLKER
Assistant General Counsel

HARRY J. SUMMERS
Attorney
Federal Election Commission

JANUARY 2007

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, APPELLANT

v.

WISCONSIN RIGHT TO LIFE, INC., ET AL.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX TO THE JURISDICTIONAL STATEMENT

LAWRENCE H. NORTON
General Counsel

RICHARD B. BADER
Associate General Cousnel

DAVID KOLKER
Assistant General Counsel

HARRY J. SUMMERS
Attorney
Federal Election Commission
Washington, D.C. 20463

PAUL D. CLEMENT
Solicitor General
Counsel of Record

GREGORY G. GARRE
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. CV04 1260 (DBS RWR RJL)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT,

AND

SEN. JOHN MCCAIN ET AL., INTERVENING DEFENDANTS

[Filed: Dec. 21, 2006]

Before: SENTELLE, Circuit Judge; ROBERTS, District Judge; and LEON, District Judge.

Opinion for the Court filed by District Judge LEON, in which Circuit Judge SENTELLE joins in full. Dissenting opinion filed by District Judge ROBERTS.

LEON, District J.

Plaintiff, Wisconsin Right to Life, Inc. ("WRTL" or "the Corporation"), brings this action against defendant, the Federal Election Commission ("FEC"), seeking a judgment declaring section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-

155, 116 Stat. 81,[1] unconstitutional as it applies to three broadcast advertisements WRTL intended to run within thirty days of Wisconsin's 2004 federal primary and sixty days of the 2004 federal general election, as well as "materially similar ads" it "intends to run" in the future. (Am. Compl. ¶¶ 1, 13, 15, 16.)

Under BCRA's prohibition on "electioneering communications," WRTL could not lawfully run the three advertisements during the 30- and 60-day periods before the 2004 primary and general elections. Thus, WRTL claims that the enforcement of BCRA with regard to these advertisements would violate the First Amendment, which provides: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. Amend. I.

Now before the Court are cross-motions for summary judgment filed on behalf of (1) WRTL, (2) the FEC, and (3) intervening defendants, United States Senator John McCain and Representatives Tammy Baldwin, Martin Meehan, and Christopher Shays (collectively, "Interveners"). Upon due consideration of the parties' submissions, the relevant case law, and the entire record herein, WRTL's Motion for Summary Judgment is GRANTED as to the three ads WRTL intended to run in 2004, and the FEC and Interveners' Motions are DENIED.

BACKGROUND

WRTL is a nonprofit, nonstock, Wisconsin, ideological advocacy corporation recognized by the Internal Revenue Service as tax-exempt under § 501(c)(4) of the

[1] Codified at 2 U.S.C. § 441b(a), (b)(2).

Internal Revenue Code.[2] (Mem. & Op., Findings of Fact ¶ 1, Sept. 14, 2006.) On July 26, 2004, WRTL began broadcasting a radio advertisement entitled "Wedding"[3] (Compl. Ex. A), which "encourage[d] Wisconsin listeners

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[2] WRTL admits that it does not qualify for any exception permitting it to pay for the exception electioneering communications from corporate funds because (a) it is not a "qualified nonprofit corporation" within the definition of 11 C.F.R. § 114.10 so as to qualify for the exception found at 11 C.F.R. § 114.2(b)(2) to the electioneering communication prohibition and (b) its advertisements are "targeted" so that it does not fit the exception for § 501(c)(4) organizations as described in 2 U.S.C. § 441b(c)(2). (Am. Compl. ¶ 23 (citing 2 U.S.C. § 441b(c)(6)(A)).)

[3] The radio script for "Wedding," attached as Exhibit A to plaintiff's Complaint, reads as follows:

> PASTOR: And who gives this woman to be married to this man?
>
> BRIDE'S FATHER: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up . . .
>
> VOICE-OVER: Sometimes it's just not fair to delay an important decision.
>
> But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve.
>
> It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.
>
> Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
>
> Visit: BeFair.org
>
> Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

to contact their U.S. Senators (Sen. Russell Feingold and Sen. Herb Kohl) . . . to ask them to vote against [the then-]anticipated filibusters of President Bush's federal judicial nominees" (Am. Compl. ¶ 6). At the same time, the Corporation initiated the production of a second radio ad entitled "Loan"[4] (Compl. Ex. B) and one

---

[4] The radio script for "Loan," attached as Exhibit B to plaintiff's Complaint, reads as follows:

> LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and well . . .
>
> COUPLE: Yes, yes . . . we're listening.
>
> OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River Waupaca . . .
>
> VOICE-OVER: Sometimes it's just not fair to delay an important decision.
>
> But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates aren't getting a chance to serve.
>
> It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.
>
> Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
>
> Visit: BeFair.org
>
> Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

television ad entitled "Waiting"[5] (*id.* Ex. C). (Am.

[5] The television script for "Waiting," attached as Exhibit C to plaintiff's Complaint, reads as follows:

> VOICE-OVER: There are a lot of judicial nominees out there who can't go to work. Their careers are put on hold because a group of Senators is filibustering—blocking qualified nominees from a simple "yes" or "no" vote.
>
> It's politics at work and it's causing gridlock.
>
> Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
>
> Visit: BeFair.org
>
> WRTL REPRESENTATIVE VOICE-OVER: Wisconsin Right to Life is responsible for the content of this advertising.

The script describes the visual aspect of the advertisement is described as follows:

> We see vignettes of a middle-aged man being as productive as possible while his professional life is in limbo:
>
> He reads the morning paper
>
> He polishes his shoes
>
> He checks for mail, which hasn't arrived
>
> He scans through his Rolodex
>
> He reads his Palm Pilot manual
>
> He pays bills.

At the end of the ad, the website "www.BeFair.org" is displayed, and a four-second disclaimer reads "Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertisement, not authorized by any candidate or candidate's committee."

Compl. ¶ 12.) Like Wedding, Loan and Waiting encourage their listeners to contact Senators Feingold and Kohl and urge them to oppose the filibustering of federal judicial nominees. None of the three advertisements, however, reference either Senator's past votes on the filibuster issue and none contain any language that could be fairly construed as promoting, attacking, supporting, or opposing ("PASO") either Senator. Yet because WRTL intended to use its general treasury funds to continue to run its ads through "the adjournment of Congress"[6] (*id.* ¶ 13), the ads would be prohibited as "electioneering communications" by BCRA section 203[7]

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[6] Elsewhere in WRTL's Complaint, the Corporation alleges that intended to run its ads "throughout August [2004]." (Am. Compl. ¶ 12.)

[7] BCRA section 203 prohibits corporations from financing "electioneering communications" through their general treasuries. *See* 2 U.S.C. § 441b(a), (b)(2). BCRA section 201, in turn, defines "electioneering communications" as:

> any broadcast, cable, or satellite communication which-
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before the primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (cc) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3(A).

According to the Act, "a communication which refers to a clearly identified candidate for Federal office is 'targeted to the relevant

between the dates of August 15 and November 2, 2004[8] (*id.* ¶ 14). Accordingly, on July 28, 2004, WRTL filed a complaint in this Court against the FEC,[9] challenging the constitutionality of section 203 as it applies to the Corporation's anti-filibuster ads and seeking "declaratory and injunctive relief permitting [the Corporation] to run [its ads] and materially similar ads in the future."[10] (Am. Compl. ¶ 15.) That same day, WRTL filed a Motion for Preliminary Injunction, requesting that the Court "preliminarily enjoin the FEC from enforcing the prohibition on corporate expenditures for electioneering communications at Section 203 of the [BCRA], as applied to (a) electioneering communications by WRTL that constitute grass-roots lobbying and (b) the electioneering communications by WRTL contained in [the Wedding, Loan, and Waiting advertisements] until a final hearing on the merits." (Pl.'s Mot. Prelim. Inj. at

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electorate' if the communication can be received by 50,000 or more persons—(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or (ii) in the State the candidate seeks to represent, in the case of a candidate for Senator." 2 U.S.C. § 434(f)(3)(C).

[8] In 2004, the Wisconsin primary was held on September 14, and the general election was held on November 2. (Am. Compl. ¶ 12.) Consequently, WRTL's advertisements would be considered "electioneering communications" from August 15 to September 14 (30 days before the primary) and from September 3 to November 2 (60 days before the general election). (*Id.* at 14.)

[9] The FEC is the government agency charged with enforcing the relevant provisions of the Federal Election Campaign Act, as amended by the BCRA. (Mem. & Op., Findings of Fact ¶ 2, Sept. 14, 2006).

[10] WRTL did not and does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds to finance the challenged advertisements. (Am. Compl. ¶¶ 34-37.)

2.) On July 29, 2004, WRTL's application for a three-judge district court was granted pursuant to 28 U.S.C. § 2284 and section 403 of the BCRA (Order, July 29, 2004); this Court was empaneled four days later (Order, Aug. 9, 2004).

On August 12, 2004, this Court held oral argument on plaintiff's Motion for Preliminary Injunction, which it denied via Minute Order later that day. In denying WRTL's Motion, we relied on the Supreme Court's opinion in *McConnell* v. *Federal Election Commission*, 540 U.S. 93 (2003). Recognizing that the *McConnell* Court was only considering a facial challenge to BCRA, this Court nevertheless concluded that "the reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge WRTL propounds before us."[11] (Mem. & Op. at 4, Aug. 17, 2004.) On May 10, 2005, following supplemental briefing by the parties, we dismissed plaintiff's Complaint in its entirety. Again, this Court concluded that "WRTL's 'as-applied' challenge to BCRA is foreclosed by the Supreme Court's decision in *McConnell*." (Mem. & Op. at 2, May 10, 2005.) Within two days of this Court's Order, plaintiff filed a Notice of

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[11] The Court pointed specifically to the Supreme Court's discussion of the BCRA's "backup" definition of "electioneering communications," 2 U.S.C. § 434(f)(3)(A)(ii), which would take effect only if the primary definition—cited above—were held to be "constitutionally insufficient." The Supreme Court declined review of the backup definition, stating: "[W]e uphold *all application* of the primary definition and accordingly have no occasion to discuss the backup definition." *McConnell*, 540 U.S. at 190 n. 73 (emphasis added).

On August 13, 2006, plaintiff filed a Motion for Injunction Pending Appeal. This Court's denial of that Motion was upheld by the Supreme Court on September 14, 2004. *WRTL* v. *FEC*, 542 U.S. 1305 (2004) (Rehnquist, Circuit Justice).

Appeal to the United States Supreme Court pursuant to 28 U.S.C. § 1253 and BCRA section 403(a)(3). (Notice of Appeal, May 12, 2005). The Supreme Court noted probable jurisdiction on September 27, 2005. *WRTL* v. *FEC*, 126 S. Ct. 36 (2005).

On January 23, 2006, the Supreme Court vacated this Court's May 10, 2005 dismissal, explaining that "[i]n upholding § 203 [of BCRA] against a facial challenge, we did not purport to resolve future as-applied challenges." *WRTL* v. *FEC*, 126 S. Ct. 1016, 1018 (2006). The case was thus remanded to this Court with instructions to "consider the merits of WRTL's as-applied challenge in the first instance." *Id.*

On March 23, 2006, this Court granted a Motion to Intervene as Defendants brought by United States Senator John McCain and Representatives Tammy Baldwin, Christopher Shays, and Martin Meehan pursuant to BCRA section 403(b). We then issued a Scheduling Order on April 17, 2006, which allowed for an expedited period of discovery.[12] From June 23 to September 11, 2006, the parties submitted their respective Motions for Summary Judgment, response briefs, and proposed find-

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[12] Our colleague, in his dissenting opinion, suggests that our earlier unanimous decision to allow discovery in this case is somehow inconsistent with our decision today to limit our constitutional evaluation of the ads to their four corners, as opposed to the context in which they would have been aired. We disagree. At the time our discovery decision was made, we had not yet focused on, let alone decided, the ultimate substantive issues we would have to resolve in order to decide this case. Simply stated, permitting discovery by the parties was necessary to ensure that both this Court and the Supreme Court would have the option of relying upon the facts developed, if doing so would be necessary to reaching the ultimate constitutional issues in this case.

ings of fact.[13] On September 18, 2006, the Court held oral argument on the parties' Motions.

STANDARD OF REVIEW

All parties move for summary judgment pursuant to Federal Rule of Civil Procedure 56, which states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-24 (1986). In deciding whether there is a disputed issue of material fact, the Court must draw all justifiable inferences in favor of the non-moving party. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Where the court finds that facts material to the outcome of the case are at issue, a case may not be disposed of by summary judgment. *Id.* at 248. If the facts in dispute are "merely colorable, or . . . not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted). Though the moving party bears the burden of establishing that there are no genuine issues of material fact and that judgment on the legal issues is appropriate in its favor, *Celotex*, 477 U.S. at 322-24, a party opposing a motion for summary judgment "may not rest upon the mere allegations or denials

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[13] Briefing was originally scheduled to be completed by September 1, 2006; however, in the course of discovery, the FEC filed a Motion to Compel that was not ruled on until August 18, 2006. The Court permitted the parties to supplement their Summary Judgment briefing in response to the discovery permitted by the Court in response to the FEC's Motion.

of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial," Fed. R. Civ. P. 56(e). If there is insufficient evidence indicating that the fact-finder could return a favorable verdict for the nonmoving party, then summary judgment is proper. *Anderson*, 477 U.S. at 252.

JURISDICTION

Jurisdiction for constitutional challenges to BCRA was squarely vested in this Court by Congress. Defendants, however, as an initial matter, oppose WRTL's constitutional challenge to the 2004 anti-filibuster ads as moot and WRTL's challenge to certain hypothetical "materially similar" ads that it wishes to run in the future as not ripe. For the following reasons, we disagree with defendants' mootness argument, but agree with their ripeness position.

I. *Mootness*

WRTL chose to forgo running its ads in 2004 rather than take the risk that enforcement proceedings would be brought against it. (Am. Compl. ¶ 52; Pl.'s Proposed Findings of Fact ¶ 42.) As a result, defendants' mootness argument boils down to its contention that Article III's "case or controversy" requirement is not satisfied because "[e]vents have so transpired that the decision [of this Court] will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." (Def.'s Mem. Addressing Apr. 17, 2006 Scheduling Order, at 3 (internal quotation marks omitted) (quoting *Pharmachemie B.V.* v. *Barr Labs., Inc.*, 276 F.3d 627, 631 (D.C. Cir. 2002)).) We disagree.

Plaintiff's factual predicament is not novel. Indeed, it is a classic example of the well-established exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." Plaintiff's citation to no less than ten federal court decisions involving election-related challenges in which this exception was applied well establishes this point. (*See* Pl.'s Mem. Compliance Apr. 17, 2006 Scheduling Order at 4-5 n.3 (citing *Norman* v. *Reed*, 502 U.S. 279, 287-88 (1992); *Meyer* v. *Grant*, 486 U.S. 414, 417 n.2 (1988); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 774 (1978); *Cal. Pro-Life Council* v. *Getman*, 328 F.3d 1088, 1095 n.4 (9th Cir. 2003); *Majors* v. *Abell*, 317 F.3d 719, 722 (7th Cir. 2003); *Fla. Right to Life, Inc.* v. *Lamar*, 273 F.3d 1318, 1324 n.6 (11th Cir. 2001); *Va. Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 390 n. 3 (4th Cir. 2001); *Stewart* v. *Taylor*, 104 F.3d 965, 969-71 (7th Cir. 1997); *N.H. Right to Life Political Action Committee* v. *Gardner*, 99 F.3d 8, 18 (1st Cir. 1996); *Kansans for Life, Inc.* v. *Gaede*, 38 F. Supp. 2d 928, 932 (D. Kan. 1999).)

Defendants grudgingly characterize the application of this exception as a "close question" notwithstanding our Circuit Court's holding in *Branch* v. *FCC*, 824 F.2d 37, 41 n.2 (D.C. Cir. 1987), that "[c]ontroversies that arise in election campaigns are unquestionably among those saved from mootness under the exception for matters 'capable of repetition, yet evading review.'" (Intervening Def.s' Resp. Scheduling Order, at 4). The thesis underlying their objection is that plaintiff cannot satisfy the two-prong test established by the Supreme Court to determine whether this exception should apply. How so?

In *First National Bank of Boston* v. *Bellotti*, the Supreme Court, citing its decision in *Weinstein* v. *Bradford*, held that a court can exercise jurisdiction over a plaintiff's claims if: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." 435 U.S. at 774 (internal quotation marks omitted; alterations in original) (quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)). Plaintiff easily satisfies both prongs of this test.

As to the first prong, it is entirely unreasonable, if not fanciful, to expect that plaintiff could have obtained complete judicial review of its claims in time for it to air its ads during the 30 and 60-day periods leading up to federal primary and general elections ("BCRA blackout period") in 2004. WRTL filed its Complaint and Motion for Preliminary Injunction in this Court on July 28, 2004. The Supreme Court issued its remand order on January 23, 2006. It is now December 2006, and despite the fact that both courts have—pursuant to BCRA section 403(a)(4)—expedited the disposition of this matter "to the greatest possible extent," plaintiff's claims have yet to be "fully litigated." Defendants' argument that "the two-year election cycle should ordinarily provide sufficient time for final resolution of the type of as-applied challenge at issue here" (Intervening Def.s' Resp. Scheduling Order, at 4-5) is wholly unrealistic. It assumes—without support—that a plaintiff can know the pieces of legislation that will be pending before Congress *two years* in advance of Congress actually considering the legislation. This Court finds no evidence in the record to suggest that WRTL knew, in the summer/fall of 2002, that judicial filibustering would be an issue be-

fore the United States Senate during the BCRA blackout period in 2004. Indeed, there is no evidence in the record to suggest that the *Senate* knew, in the summer/fall of 2002, that judicial filibustering would be an issue during the BCRA blackout period in 2004. In fact, it was not until December 10, 2003—the date that the Supreme Court issued its opinion in *McConnell*—that *anyone* knew if there would even be a BCRA blackout period in 2004. Thus, WRTL easily satisfies the first prong of the *Weinstein* test.

As to the second prong, the Court finds that there is a highly "reasonable expectation" that plaintiff "will be subject to the same action again." Defendants' contrary argument that the present controversy is *incapable* of repetition is premised on its contention—that we reject—that the context surrounding the creation and dissemination of the ads (including plaintiff's intent, the availability and adequacy of non-broadcast media, the perceptions of the target audience, and the circumstances of the 2004 campaign) should be relied upon in assessing this decision. (*See id.* at 5.) To the contrary, because we believe that our review should be limited to the text and images of the ads themselves—as will be explained more fully later—we are not concerned with the supposed "perfect storm" of contextual characteristics alleged by defendants.[14] While WRTL's intention to

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[14] To the extent the District Court in *Christian Civil League of Maine, Inc. ("CCLM")* v. *FEC*, No. 06cv0614, 2006 WL 2792683 (D.D.C. Sept. 27, 2006)—confronted with essentially the same issue—held that "the League's claims are . . . moot and not saved by the 'capable of repetition, yet evading review' exception to the doctrine insofar as they do pertain to the circumstances surrounding the League's efforts to broadcast the Crossroads advertisement," *CCLM*, 2006 WL 2792683, at *1, we respectfully disagree.

run genuine issue advertisements during future BCRA blackout periods is not enough to sustain its generalized claim regarding "grassroots lobbying advertisements," it is enough to create a "reasonable expectation" that it "will be subject to the same action again."[15] In light of the fact that legislation typically arises in the 30- and 60-day periods before a federal primary or general election, *see McConnell* v. *FEC*, 251 F. Supp.2d 176, 793 (D.D.C. 2003) (Leon, J.), this Court finds that WRTL's remaining claim is "capable of repetition, yet evading review."

II. *Ripeness*

WRTL's as-applied challenge features a prophylactic challenge to what it anticipates to be the prohibition by the FEC of its broadcasting "materially similar" ads in future election contests. WRTL appears to add this prayer for relief as part of its larger objective: to get this Court—and ultimately the Supreme Court—to carve out an exception to BCRA's electioneering communications definition for what it refers to as "grassroots lobbying" advertisements. (Am. Compl. ¶ 6.) Indeed, WRTL admits that "this Court is not *required* by the [Supreme Court's] remand to go beyond WRTL's specific ads," but nevertheless asks the Court to fashion a "more general rule to guide the regulated public." (Pl.'s Mem. Compliance Apr. 17, 2006 Scheduling Order at 7.) Defendants, not surprisingly, contend that this Court should not consider WRTL's generalized grass-

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[15] In fact, WRTL attempted to run a different ad during the BCRA blackout period in 200[illegible] while the ad was not the textual equivalent of the ads in this case—and while this Court does not speak to merits of WRTL's claim as to that ad—the attempt nevertheless lends credence to WRTL's contention that there is a "reasonable expectation" that it "will be subject to the same action again."

roots lobbying claim as it is "beyond the scope of the Supreme Court's remand, . . . not ripe, and . . . too speculative and hypothetical to be justiciable under Article III." (Def.'s Mem. Addressing Apr. 17, 2006 Scheduling Order, at 8.) We agree.

WRTL alleges, at most, that it "intends to run materially similar grass-roots lobbying ads falling within the electioneering communication prohibition periods before future primary and general elections in Wisconsin." (Am. Compl. ¶ 16.) Simply stated, such an intention is too speculative and thus not sufficiently concrete to state a cognizable claim under Article III. Like another three-judge panel of this District Court that recently reached the same conclusion in a similar case, *see CCLM*, 2006 WL 2792683, at *2-5, we also cannot expand our authority beyond the contours of Article III. Accordingly, we reject WRTL's generalized lobbying claim as unripe and turn to plaintiff's arguments challenging the constitutionality of BCRA as it applies to the three anti-filibuster ads.

ANALYSIS

Reduced to its essence, plaintiff's as-applied challenge boils down to two arguments: (1) that its 2004 ads are neither express advocacy nor its functional equivalent; and (2) that the Government has failed to demonstrate a compelling interest in regulating these ads. For the following reasons, we agree with each of plaintiff's contentions.

I. *Express Advocacy and Its Functional Equivalent Versus Genuine Issue Advertising*

In *McConnell*, 540 U.S. 93, the Supreme Court evaluated a facial challenge to the constitutionality of BCRA's

electioneering communications provision. In doing so, its majority concluded that there was a compelling government interest in regulating express advocacy and its functional equivalent (i.e., "sham issue ads") during the BCRA blackout period. Based on our interpretation of that ruling, this three-judge Court in 2004 dismissed this as-applied challenge to the constitutionality of the FEC's prohibition of the ads designed to be aired on television in Wisconsin during the BCRA blackout period leading up to the 2004 primary and general election. On appeal, however, the Supreme Court, in evaluating our decision, stated that *McConnell* had *not* foreclosed as-applied challenges to the constitutionality of the electioneering communications definition and, accordingly, remanded the case back to us for consideration of the merits of WRTL's claims. In doing so, the Supreme Court, in essence, acknowledged the possibility that certain ads (i.e., "genuine issue ads"), that are neither express advocacy nor its functional equivalent, could be unconstitutionally captured by BCRA's electioneering communications definition. Plaintiff, not surprisingly, contends that these ads fall into that category.

To determine whether plaintiff is correct, this Court must engage in a two-step analysis of the ads in question. First, it must evaluate whether any or all of the ads constitute either express advocacy or its functional equivalent. If they do, of course, that would be the end of the challenge because the Supreme Court in *McConnell* upheld BCRA's authority to regulate them. If they are not, however, this Court must then move on to determine whether the Government has demonstrated the necessary compelling state interest to regulate genuine issue ads during the 30- and 60-day periods leading up to the federal primary and general elections.

Defendants contend that all three ads are sham issue ads and are therefore regulable under the Supreme Court's majority holding in *McConnell*. The keystone to the defendants' analysis is their contention that the determination of whether an ad is a sham issue ad should not be limited to a facial evaluation of the ad's language and images, but a contextual analysis of the "intent" behind the ad's creation and the "effect" that the ad is intended, and likely, to have on the voting public. Plaintiff disagrees strongly. It contends that the judicial assessment of the ads should be limited to a facial evaluation of the ads' language and images. Determining intent and the likely effect of an ad on the viewing public is, to plaintiff's way of thinking, too conjectural and wholly impractical if future as-applied challenges are going to be evaluated on an emergency basis by three-judge panels prior to and during the BCRA blackout period leading up to federal primary and general elections. We agree.

The three ads in this case all deal with the public policy issue of filibustering the President's judicial candidates in the Senate. On their face, they set forth WRTL's position against this practice and conclude with the all-too-familiar "call-to-action line" exhorting viewers/listeners, who presumably agree with WRTL's position, to contact Wisconsin's two United States Senators, Kohl and Feingold, and inform them of their opposition. The ads do not comment on either Senator's past or current position regarding this practice. Indeed, to the untutored viewer's eye, the ads, on their face, neither reveal either Senator's thinking on the issue, nor reference Senator Feingold's upcoming election contest. Therefore, plaintiff contends that these ads are a text-

book example of genuine issue ads that are neither express advocacy nor its functional equivalent.

Defendants nonetheless contend that it is legally insufficient to limit an analysis of the ads to the face of the ads themselves and their objectively discernable components. They fear that doing so would ultimately result in the airing of too many issue ads that were *actually* "intended" to affect an election. Of course, to discern whether the sponsoring organization of these issue ads had the primary, or even ancillary, subjective intention to affect the election of the named candidate, the FEC would, by necessity, have to depose, at a minimum, the "decision maker(s)" of the organization in advance of the advertisements' airing. Moreover, to determine whether a particular ad that was intended to affect the election actually was likely to do so, would additionally require the retention of expert witnesses, on both sides, to speculate as to such. Common sense, if nothing else, dictates that requiring such prerequisites to assessing whether a given ad is a "sham ad" and therefore regulable under BCRA's electioneering communications definition is both practically and theoretically unacceptable.

It is practically unacceptable because as-applied challenges, to be effective, must be conducted during the expedited circumstances of the closing days of a campaign when litigating contextual framework issues and expert testimony analysis is simply not workable. More importantly, however, is the fact that it is theoretically unacceptable because it proceeds on the highly questionable assumptions that: (1) any subjective intent to affect the election, regardless of its degree of importance, should negate an otherwise genuine issue ad; and (2) the

speculative conjecture of experts can *actually* project the "likely" impact of a given ad on the electoral process. Neither the Supreme Court, nor any other Court, has recognized the validity of either assumption, and we do not find sufficient evidence here to bless either.[16] To the contrary, as recognized by the Supreme Court, delving into a speaker's subjective intent is both dangerous and undesirable when First Amendment freedoms are at stake. Indeed, in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Supreme Court itself recognized that a test distinguishing between a discussion of issues and a discussion of candidates should not be based on a listener's determination of the speaker's subjective intent. The *Buckley Court* cited its prior decision in *Thomas* v. *Collins*, 323 U.S. 516, 535 (1945), with approval:

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[16] While, as our colleague's dissent recognizes, the Supreme Court's *McConnell* opinion may have alluded to the purpose and effect for which ads were run in analyzing whether section 203's definition of "electioneering communication" was facially constitutional, the Court's reasoning was not based upon an analysis of the subjective intent of either the parties airing the advertisements or the listeners hearing them. Rather, it was based largely upon an assessment of the generic past practices of certain media experts in designing sham issue ads that would affect elections, but not include the so-called "magic words" prohibited by *Buckley*. *See McConnell*, 540 U.S. at 193. Even those experts had to concede, however, that there are such things as genuine issue ads that the definition in section 203 would capture some of the time. *See, e.g.*, *McConnell*, 251 F. Supp. 2d at 794-95 (Leon, J.). The as-applied challenge here, by contrast, puts squarely before a court for the first time the issue of whether three particular ads are genuine issue ads, thereby forcing this Court to decide whether to limit its assessment of the purpose and effect of those ads to the information contained within the ads' four corners. Thus, since the *McConnell* Court was spared such a choice in dealing with the facial challenge it confronted, its references to purpose and effect are of limited significance in this matter today.

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43.[17]

The uncertainty originally identified in *Thomas* is magnified, or course, in the context of election-related speech where any reference to a candidate, who is an office holder, can be interpreted—or misinterpreted—as campaign-motivated, as opposed to public policy-motivated. Thus, a system such as that encouraged by defendants where federal judges would be charged with

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[17] It is this language that led the Supreme Court to develop a "saving construction"—later termed the "magic-words test"—for old FECA § 608(e)(1), which provided that "[n]o person may make any expenditure . . . *relative to* a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000." Noting that FECA contained no definition clarifying what expenditures are "relative to" a candidate, the Supreme Court found that it was unconstitutionally vague. *Buckley*, 424 U.S. at 41-42.

conjuring the subjective intent of the speaker to affect the election would fly in the face of decades of First Amendment jurisprudence and undoubtedly chill those exercising their free speech rights. Simply stated, it appears to this Court that the judiciary, in conducting First Amendment analysis, should not be in the business of trying to read any speaker's mind. Such an inquiry is unprecedented and not properly a part of any First Amendment analysis.

Accordingly, in evaluating whether WRTL's 2004 anti-filibuster ads are express advocacy or its functional equivalent, this Court will limit its consideration to language within the four corners of the anti-filibuster ads that, at a minimum: (1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate. In addition, as to the televised ad, the Court will also look to the images displayed in concert with the language to evaluate whether they otherwise accomplish the prohibited result.[18]

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[18] Our colleague notes in his dissent a particular website reference that is included in the credits at the end of all three of the advertisements at issue. According to defendants, the website itself contained language that either opposed or attacked Senator Feingold and is therefore cited as proof that WRTL's intention in running the radio and television advertisements was to negatively influence Senator Feingold's electoral chances. Considering that BCRA regulates neither references to, nor the content of, advocacy-based websites, this Court

In this case, the language in WRTL's advertisements does not mention an election, a candidacy, or a political party, nor do they comment on a candidate's character, actions, or fitness for office. Nevertheless, they do describe an issue that had been, and was likely to be, an ongoing issue of legislative concern in the Senate. Further, while the advertisements state that "[a] group of Senators" is filibustering federal judicial nominees, the ads do not state that either Senator Feingold or Senator Kohl are members of that group, and none of the images displayed in WRTL's television advertisement suggest as much. In fact, the only reference to Senator Feingold is in the closing line of the advertisements, or "call-to-action line," asking the listener to contact *both* Senator Feingold and Senator Kohl to ask them to oppose judicial filibusters.[19] The ads do not promote, attack, sup-

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believes that, unless and until Congress decides to amend BCRA to include such a regulation, WRTL's references to its website have no bearing on this Court's constitutional analysis.

[19] As a member of the three-judge District Court in *McConnell*, Judge Leon concluded that "[t]he mere fact that these issue advertisements mention the name of a candidate (i.e., the elected representative in whose district the advertisement ran) does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes." 251 F. Supp. 2d at 794. In support of this conclusion, he cited to several of the plaintiffs' witnesses in that case. For example, Paul Huard of the National Association of Manufacturers ("NAM") testified that the name of a particular Member of Congress generally must be mentioned "if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position." *Id.* (citation omitted). Similarly, Denise Mitchell, Special Assistant for Public Affairs to the AFL-CIO, concurred, explaining that it is often necessary to refer to a federal candidate by name because "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question." *Id.* (citations omitted;

port, or oppose either Senator, nor do they even reference in any way the Senators' past voting records, current positions, or previous public statements on the judicial filibuster issue. Thus, on the face of these ads, there is simply no way of telling whether either Senator had previously supported or opposed the filibuster or whether the Senators had split on the issue. Finally, it is important to note that the advertisements treat Senators Feingold and Kohl equally, even though Senator Kohl was not a candidate for federal office in 2004. Oddly enough, had WRTL wished to run these ads mentioning only Senator Kohl, and ignoring Wisconsin's other United States Senator, it could have done so without offending BCRA section 203.

Accordingly, for all of the above reasons, the Court finds that, on their face, WRTL's three 2004 anti-filibuster advertisements were not "intended to influence the voters' decisions," and thus, the Court need not analyze whether the ads *in fact* would have—or potentially could have—affected Senator Feingold's reelection. For even if the Court were to assume that WRTL's anti-filibuster ads "were likely to have had an effect on the Senate Election had they run during the electioneering communications period"[20] (Def.'s Opp'n to Mot. Summ. J. at 9), reliance on effect, without the requisite intent, would be

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alterations in original).

[20] See our Circuit Court's discussion in its underlying opinion in *Buckley* v. *Valeo*, 519 F.2d 821, 875 (D.C. Cir. 1975), which recognized that: "Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussion of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections."

the equivalent of permitting listeners' subjective impressions to justify the regulation of protected speech. This is precisely the type of analysis that *Buckley* and *Thomas* said should be avoided.

Thus, the Court concludes that WRTL's 2004 anti-filibuster ads are not the functional equivalent of express advocacy, and the Court must now turn to an evaluation of whether the Government has demonstrated the compelling state interest necessary to justify the degree to which BCRA section 203 burdens WRTL's First Amendment rights.

II. *Strict Scrutiny Analysis*

In *McConnell*, the Supreme Court "easily" concluded, based on its prior decisions regarding campaign finance regulation, that there are compelling state interests that justify the regulation of express advocacy and its functional equivalent during the 30- and 60-day periods leading up to federal primary and general elections, respectively. 540 U.S. at 205. In particular, the Court pointed to its prior decisions in *Buckley* and *Bellotti*, where it spelled out the "unusually important interests [that] underlie the regulation of corporations' campaign-related speech," *id.* at 206 n.88, such as: preventing corruption, preserving the integrity of the electoral process, and preserving the public's confidence in its government, *id.* (citing *Bellotti*, 435 U.S. at 788-89).

The plaintiffs who prosecuted the facial challenge in *McConnell*, however, did not contest the Government's "compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office." *Id.* at 205. "Nor d[id] they contend that the speech involved in so-called issue advocacy is any more core political speech than are words of express

advocacy." *Id.* Instead, they limited their attack to overbreath, claiming that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications," i.e., genuine issue ads that otherwise meet the requirements of BCRA section 203. *Id.* at 206.

The Supreme Court disagreed. It concluded that the justifications for the regulation of express advocacy (i.e., the compelling government interests) equally apply to issue ads aired during the proscribed statutory period "*if* the ads are intended to influence the voters' decisions and have that effect." *Id.* at 206 (emphasis added). Indeed, it characterized such issue ads as the "functional equivalent" of express advocacy. *Id.* Thus, even "assum[ing] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," *id.* at 206 n.88, the Supreme Court nonetheless held that BCRA section 203's application to genuine issue ads was not substantial enough to strike down this section of the statute as facially unconstitutional.[21] By permitting as applied challenges to section

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[21] In performing its substantial overbreadth analysis, the Supreme Court was willing to "assume[ ] that BCRA will inhibit some constitutionally protected corporate and union speech," but nevertheless concluded that "[such an] assumption would not 'justify prohibiting all enforcement' of the law unless its application to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.'" *McConnell*, 540 U.S. at 207 (quoting *Virginia* v. *Hicks*, 539 U.S. 113, 120 (2003)). Without determining the "precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose," *Id.* at 206, the Supreme Court concluded that "the vast majority of ads clearly had such a purpose," *Id.* In the final analysis, the Supreme Court held that

203's constitutionality, however, the Supreme Court has now put in play the question it left open in *McConnell* as to whether the government interests that justify regulating express advocacy and its functional equivalent also apply to the regulation of genuine issue ads. For the following reasons, this Court holds that they do not.

The common denominator between express advocacy and its functional equivalent, as the Supreme Court defined it in *McConnell*, is the link between the words and images used in the ad and the fitness, or lack thereof, of the candidate for public office.[22] Indeed, it is that very link which evinces, on the face of the ad, the intent to influence the election that the *McConnell* Court imposed as a critical requirement to functional equivalency. Conversely, it is the absence of that link that enables an issue ad to be fairly regarded as a genuine issue ad. More importantly, it is the absence of that link which obviates the likelihood of political corruption and public cynicism in government where the ad, on its face, is devoid of any language the purpose of which is advocacy either for or against a particular candidate for federal office. Thus, while it may be theoretically possible to craft a genuine issue ad so subtly that it subconsciously encourages (or discourages) a potential voter to support a political candidate, there is no evidentiary or common sense basis to

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plaintiffs failed to "carry their heavy burden of proving that amended FECA § 316(b)(2) is overbroad" because "[f]ar from establishing that BCRA's application to pure issue ads is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion." *Id.* at 207.

[22] *See McConnell*, 251 F. Supp.2d at 796 (Leon, J.) ("It is the absence of a link between the advocacy of an issue and a candidate's fitness, or lack thereof, for election that renders congressional intervention with respect to genuine issue ads . . . unconstitutional.").

believe that such facially neutral ads are *necessarily* intended to affect an election, or will *necessarily* be viewed as such. Accordingly, in the absence of the Government demonstrating some other compelling interest to regulate genuine issue ads during the 30- and 60-day periods leading up to the federal primary and general election, the Court holds that Section 201's definition[23] as applied through section 203 to WRTL's 2004 anti-filibustering issue ads is unconstitutional.

Turning to the Government's alternative bases for regulating genuine issue ads, the only other interest that the Government puts forward to justify BCRA section 203's regulation of WRTL's 2004 anti-filibuster advertisements is the interest in preserving section 201's "bright-line" rule. Yet the virtues of the bright-line rule surely cannot alone justify regulating constitutionally protected speech. The Supreme Court itself has already held that the "desire for a bright-line rule . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (emphasis in original). And its remand of our earlier decision to permit this as-applied challenge is a tacit acknowledgment that, notwithstanding the virtues of a bright-line test, there may nonetheless be some ads that are unconstitutionally captured by BCRA section 203. Thus, having concluded that WRTL's three 2004 anti-filibuster ads are such advertisements, we are hard-pressed indeed to conclude that preserving section 201's bright-line rule is a sufficiently

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[23] *See supra* note 7.

compelling interest to warrant the ongoing regulation of these ads under BCRA.[24]

CONCLUSION

For the foregoing reasons, the Court finds that (1) WRTL's 2004 anti-filibuster ads are neither express advocacy nor its functional equivalent; and (2) the Government has not articulated a sufficiently compelling interest to justify the burden that BCRA section 203 places on WRTL's First Amendment rights. Accordingly, the Court GRANTS plaintiff's Motion for Summary Judgment as it applies to the three broadcast advertisements WRTL intended to run in 2004 and DENIES defendants' cross-motions. An appropriate Order will issue with this Memorandum Opinion.

12/21/06
Date

/s/ DAVID B. SENTELLE
DAVID B. SENTELLE
United States Circuit Judge

12/21/06
Date

/s/ RICHARD J. LEON
RICHARD J. LEON
United States Circuit Judge

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[24] Because we conclude that the Government has failed to demonstrate a compelling state interest in regulating WRTL's 2004 anti-filibuster ads, we need not address whether WRTL could/should have pursued other options for the financing of its advertisements or altered the content of its ads so as to avoid BCRA section 203's regulation altogether.

ROBERTS, District Judge, dissenting.

The majority employs a plain facial analysis of the text in WRTL's 2004 advertisements—ignoring the context in which the text was developed—to assess whether the ads are genuine issue ads which should escape BCRA's reach, or are regulable electioneering communications. This approach is inconsistent with *McConnell*, is inconsistent with this panel's own prior rulings, and finds little support in logic. Because a contextual analysis is warranted and discloses deep factual rifts between the parties concerning the purpose and intended effects of the ads, neither side is entitled to judgment as a matter of law, and I respectfully dissent from the majority's decision granting summary judgment to WRTL.

DISCUSSION

WRTL, the FEC and the intervenors have moved for summary judgment. Summary judgment may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56; *Shekoyan* v. *Sibley*, 409 F.3d 414, 422 (D.C. Cir. 2005). Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. at 248 (1986) (further holding that there is a genuine issue of material fact if the evidence is such that a reasonable jury could return a verdict for the non-moving party). "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ." *Id.* at 255. In this case, in which parties have filed cross-motions for summary judgment, this panel must determine whether either party, as movant, has demonstrated that there is no dispute concerning the material

facts that must be assessed to determine the constitutionality of § 203's prohibition as applied to WRTL's 2004 advertisements.

WRTL challenges § 203 as applied to its advertisements. "An as-applied challenge . . . requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right." *Field Day, LLC* v. *County of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006). WRTL argues that its ads are grassroots lobbying which should be exempt from BCRA's regulations because it is not electioneering communication. (Mem. in Supp. of Pl.'s Mot. Summ. J. ("Pl's Mot. Summ. J.") at 38.) WRTL asserts that even if this panel does not recognize a grassroots lobbying exemption,[1] its ads are genuine is-

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[1] Because one of the "cardinal rules governing federal courts . . . [is] never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985), there is no need to address the issue of whether a grassroots lobbying exemption should be carved out. In 2006, the Supreme Court remanded this case to this three-judge panel with the instruction that this panel "consider the merits of WRTL's as-applied challenge in the first instance." *Wis. Right to Life* v. *Fed. Election Comm'n*, 126 S. Ct. 1016, 1018 (2006). The remand did not order this panel to adopt a definition of advertising that could be considered grassroots lobbying or genuine issue advocacy, definitions never offered by the Supreme Court. Instead, this panel was expected to use *McConnell*'s holding that § 203 was not facially unconstitutional and determine if WRTL's ads should, nonetheless, not be regulated by BCRA. The responsibility of this panel is to determine if WRTL's 2004 ads, which do not purport to be express advocacy, can still be constitutionally regulated, not to identify the contours of advertising that is grassroots lobbying or genuine issue advocacy. *See Ctr. for Individual Freedom* v. *Carmouche*, 449 F.3d 655, 665 (5th Cir. 2006) ("*McConnell* states only that a campaign finance regulation can cover

sue ads which are not the functional equivalents of regulable express advocacy. Because the Supreme Court acknowledged that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," *McConnell*, 540 U.S at 206 n.88, WRTL maintains that as applied to its ads, § 203 is unconstitutional.[2]

The FEC and the intervenors argue that WRTL's ads are electioneering communications that are properly regulable under BCRA, and that a grassroots lobbying exemption would threaten the Supreme Court's ruling in *McConnell*. (Def.'s Mem. in Supp. of Mot. Summ. J. ("Def.'s Mot. Summ. J.") at 1, 21, 26.) They claim that the ads were intended to influence the votes in the 2004 Senate election and fit the very type of activity that *McConnell* found Congress had a compelling interest in regulating. The defendants also assert that the ads were designed and timed to set up a legal challenge to the BCRA and thus were not genuine issue ads entitled to be funded by corporate funds.

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issue advocacy and nevertheless be constitutional so long as the regulation is 'closely drawn' to match a 'sufficiently important' government interest . . . and is not vague." (internal citations omtted)).

[2] WRTL suggests that the remand in this case makes clear that the Supreme Court has permitted as-applied challenges "regarding communications that necessarily fall within the prohibition periods or there would [be] no as-applied challenges at all." (Pl.'s Opp'n to Def.'s Mot. to Compel at 5.) The Supreme Court did not state that there had to exist an as-applied challenge that would succeed; it merely held that "in upholding § 203 against a facial challenge, [it] did not purport to resolve future as-applied challenges." *Wis. Right to Life*, 126 S. Ct. at 1018.

I. *McConnell*

McConnell upheld the validity of the electioneering communication definition in § 203 of BCRA over a First Amendment challenge. Noting that "[g]overnment has a compelling interest in regulating advertisements that expressly advocate for the election or defeat of a candidate for federal office," *McConnell*, 540 U.S. at 205, the *McConnell* Court cited numerous values relating to this interest, including " '[p]reserving the integrity of the electoral process, preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.'" *Id.* at 206 n.88 (quoting *First Nat'l Bank* v. *Bellotti*, 435 U.S. at 788-89). Although the Court recognized the existence of genuine issue ads, it nevertheless held that some issue advertisements could fall within the category of electioneering communications to be regulated by BCRA.[3] *McConnell*, 540 U.S. at 206. Using the Bill Yellowtail advertisement as an example, the Court explained that "although. . . . advertisements [may] not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." *Id.* at 193.[4] *McConnell* held that

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[3] The Court found little difference "between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *McConnell*, 540 U.S. at 126-27.

[4] A group called "Citizens for Reform" sponsored an advertisement during the 1996 Montana congressional race in which Bill Yellowtail was a candidate. The advertisement stated: "'Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But her "nose was not broken." He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own

§ 201's electioneering communication was narrowly tailored to meet a compelling government interest. In its constitutional analysis of § 203, the Court described viable alternatives for organizations seeking to broadcast "genuine issue advertising" without running afoul of the electioneering communication provision: "corporations and unions may finance genuine issue ads . . . [during prohibited periods] by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.* at 206.

II. *Facial Analysis*

The landscape of campaign finance law has been changed by BCRA and *McConnell*. There is no longer a bright line rule for distinguishing between express advocacy and genuine issue advocacy to determine which may be constitutionally regulated. Courts can no longer rely on *Buckley* v. *Valeo*'s magic words test to determine whether the advertising at issue is electoral advocacy, namely whether certain election-related words are present or absent. *Id.*, 424 U.S. at 43-44 & 44 n.52. Before *McConnell*, some judicial sentiment disfavored examining the context rather than the literal text of election ads.[5] For example, *North Carolina Right to Life, Inc.* v.

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child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.'" *McConnell*, 540 U.S. at 194 n.78 (internal citation omitted). The Court said that "[t]he notion that this advertisement was designed purely to discuss the issue of family values strains credulity." *Id.*

[5] That sentiment was not unanimous. *See Federal Election Comm'n* v. *Furgatch*, 807 F.2d 857, 863-64 (9th Cir. 1987) (holding that in the realm of express advocacy, although context is a limited concern especially when assessing the impact of the speech itself, it nonetheless "is relevant to a determination of express advocacy. A consideration of the context in which speech is uttered may . . . supply necessary

Leake, 344 F.3d 418 (4th Cir. 2003), held unconstitutional a provision of a North Carolina campaign reform statute that allowed a contextual examination of an advertisement to determine its status as express advocacy. "This circuit . . . has consistently interpreted *Buckley* as allowing regulation 'only if it [is] limited to expenditures for communications that literally include *words* which in and of themselves advocate the election or defeat of a candidate.'" *Id.* at 425 (internal citations omitted). There is no doubt, though, that *McConnell* has unsettled those sentiments. *Leake* was vacated and remanded by the Supreme Court in light of its *McConnell* decision. *Leake* v. *North Carolina Right to Life, Inc.*, 541 U.S. 1007 (2004).

That *Leake* was vacated comes as no surprise. The *McConnell* Court assessed the subjective intention of the advertising before it in deciding that § 201 was not overly broad. The Court evaluated ads which their proponents claimed were genuine issue advertising with no electioneering purpose and nevertheless concluded that although an advertisement may not plainly promote or attack a candidate, it may still be "clearly *intended* to influence the election." *McConnell*, 540 U.S. at 193 (emphasis added) (further stating that "[f]ar from establishing that BCRA's application to pure issue ads is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion."). In discussing the record, the *McConnell* Court specifically examined both the purpose of the ads before it as well as their impact on the relevant election. "The precise percentage of

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premises that are unexpressed but widely understood by readers or viewers.").

issue ads that clearly identified a candidate and were aired during those relatively brief pre-election time-spans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court . . . . Nevertheless, the vast majority of ads clearly had such a *purpose*." *Id.* at 206 (emphasis added) (further stating that "justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are *intended* to influence the voters' decisions and have that *effect*." (emphases added)).

The majority does not believe that this panel should engage in a contextual analysis, claiming that such an inquiry is foreclosed by the Supreme Court's holdings in *Buckley* and *Thomas*. My colleagues quote language in *Thomas* to suggest that an intent- and effect-based inquiry into whether or not an advertisement is express advocacy will create ambiguity and uncertainty on the part of the speaker. They suggest that a facial analysis of whether the advertisement, among other things, promotes or attacks the named candidate, is appropriate and that any other course of action is impractical and undesirable. However, the *McConnell* Court looked precisely to the purpose and effect of advertising in a facial challenge to the constitutionality of the electioneering communication provision, and there is no logical reason why this panel should not engage in such an analysis for an as-applied challenge. *See Alaska Right to Life Comm.* v. *Miles*, 441 F.3d 773, 785-86 (9th Cir. 2006) (citing *McConnell* for the proposition that an advertisement's effect matters in both a facial and an as-applied challenge for overbreadth to an Alaska campaign finance law). A purpose- and effect-based inquiry seems necessary to determine if WRTL's ads are genuine issue

ads or are instead express or sham issue advocacy because the "presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." *McConnell*, 540 U.S. at 193.

The majority also appears to blur the Supreme Court's prohibition on employing a test that involves the subjective intent of the *listener* and one that involves the subjective intent of the *advertiser*. *See* McConnell v. *Fed. Election Comm'n*, 251 F. Supp. 2d at 568 (opinion of Kollar-Kotelly, J.) ("[T]he Supreme Court made clear that a test distinguishing between a discussion of the issues and a discussion of candidates that relied on the subjective intent of the listener was problematic."). In *Thomas*, the Court criticized a test based upon an "understanding of the hearers," but drew no conclusion about whether the speaker's purpose could be used to examine the nature of the speech. The majority cites no precedent holding that there may be no inquiry into the subjective intent of the speaker in determining the type of speech made.[6]

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[6] Indeed, criminal statutes enacted by Congress punish conduct or speech based upon a prohibited intent or purpose of the speaker. *See*, e.g., 18 U.S.C. §§ 245(b)(1),(4), 248(a)(1), 42 U.S.C. § 3631(b), (c) (threat with the purpose of intimidating someone from engaging in protected activities); 18 U.S.C. § 288 (false statement for purpose of obtaining payment on false postal indemnity claim); 18 U.S.C. §§ 875(b), (d), 876(b),(d), 877 (threat to injure with intent to extort); 18 U.S.C. § 1033(a)(1) (false statement with intent to deceive insurance regulator); 18 U.S.C. § 1583 (persuading another to go to another place with intent to make him a slave); 18 U.S.C. § 1860 (verbal intimidation for the purpose of hindering land purchase). Among them are statutes that have survived First Amendment challenges. *See*, e.g., *United States* v. *Dinwiddie*, 76 F.3d 913, 922, 925 (8th Cir. 1996) (18 U.S.C. § 248, stating that a court "must analyze an alleged threat in light of its entire factual context" (internal citation omitted)); *accord Terry* v. *Reno*, 101

In ignoring the context in which the advertisements were developed, the majority also takes a sharp turn from its own prior rulings. Two years ago, this panel unanimously found that WRTL had failed to establish a likelihood of success on the merits and denied its motion for injunctive relief, stating that "[t]he facts suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Wis. Right to Life* v. *Fed. Election Comm'n*, Civil Action No. 04-1260, 2004 WL 3622736, at *3 (D.D.C. Aug.17, 2004). We explicitly found and cited contextual facts as relevant to our conclusion discounting the likelihood of finding any constitutional infirmity in BCRA's regulation of the WRTL advertisements.[7]

After the remand from the Supreme Court, this panel more than once took a clear position favoring con-

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F.3d 1412, 1418 (D.C. Cir. 1996); *United States* v. *Gregg*, 226 F.3d 253, 267 (3d Cir. 2000) (collecting cases upholding 18 U.S.C. § 248 against a First Amendment challenge); *United States* v. *Hutson*, 843 F.2d 1232, 1235 (9th Cir. 1988)(18 U.S.C. § 876); *United States* v. *Cassel*, 408 F.3d 622, 634-35 (9th Cir. 2005) (18 U.S.C. § 1860). *Cf. Virginia* v. *Black*, 538 U.S. 343, 363 (2003) (noting that "[t]he First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation").

[7] We found that Senator Feingold's opponents used as a campaign issue over a year before the election his support of filibusters against judicial nominees; that WRTL's PAC endorsed in March 2004 three candidates opposing Senator Feingold and announced his defeat as a priority; and that WRTL criticized in a July 2004 news release Senator Feingold's record on Senate filibusters against judicial nominees. *Wis. Right to Life* v. *Fed. Election Comm'n*, Civil Action No. 04-1260, 2004 WL 3622736, at *1 (D.D.C. Aug. 17, 2004). We did not depart from those findings on May 10, 2005, when we unanimously dismissed WRTL's case.

textual analysis when the parties voiced sharp disagreement over what if any discovery would be relevant to the merits of WRTL's complaint. The FEC and the intervenors proposed a briefing schedule that contemplated conducting discovery into a variety of issues regarding the purpose and effect of WRTL's 2004 advertisements. (Def.'s Opp'n to Pl.'s Mot. to Reinstate, Order Supp. Briefing, and Expedite Cross-Mots. Summ. J. at 3-4; Def.'s Mem. in Support of Rule 16 Proposal for Disc. and Summ. J. at 3; Intervenors' Mem. in Support of Def.'s Rule 16 Proposal for Disc. and Summ. J. at 1-2.) WRTL urged that such discovery bearing on context was flatly irrelevant, and insisted that the constitutional question turns solely upon the content of the communication itself, making discovery unnecessary. (Pl.'s Reply Mem. in Supp. of Mot. to Reinstate, Order Supp. Briefing, and Expedite Cross-Mots. for Summ. J. ("Pl's Reply Mem.") at 4, 8.) This panel unanimously rejected WRTL's position and ordered a period of discovery "into the purpose and effect of plaintiff's 2004 advertisements for the 2004 campaign[,]" among other topics. (Scheduling Order of Apr. 17, 2006 at 2.) And when WRTL later resisted discovery into to the purpose and effect of its 2004 advertisements (Def.'s and Intervenors' Mot. To Compel Produc. of Docs., Reqs. to Admit, Resps. to Interrogs. ("Def.'s Mot. to Compel") at 1-2) as irrelevant and arguing that the constitutionality of BCRA's application to speech depends only upon the text rather than the context of the speech (Pl.'s Opp'n to Def.'s Mot. To Compel Produc. of Docs., Reqs. to Admit, Resps. to Interrogs. at 5, 8), this panel unanimously compelled WRTL to respond to all of the twenty-two discovery requests propounded either fully or with minor modifications. (Def.'s Mot. to Compel at 5-6, 9-19, 21-22; Order, Aug. 18, 2006.)

Our repeated decisions requiring inquiry into the context in which the advertisements were developed were right then, and they are right now. The majority now brushes them aside and adopts the very approach that it squarely and repeatedly rejected. It partly justifies using its facial analysis approach for reasons of judicial manageability, *supra* at 17-18, a basis for decision that even the plaintiff rejects. (Pl.'s Reply Mem. at 8 (stating that in selecting a proper analytical standard, "constitutional mandates clearly outweigh . . . judicial manageability").)

Any analysis of whether WRTL's ads are genuine issue ads should be achieved through assessing the ads' context and WRTL's purpose or intent in broadcasting the ads.

CONTEXTUAL ANALYSIS

I. *Express Advocacy*

WRTL claims that its ads are not express advocacy because they do not "expressly advocate for the election or defeat of a candidate for federal office." *McConnell*, 540 U.S. at 205. WRTL instead maintains that its ads are grassroots lobbying that discusses legislative concerns. Although WRTL acknowledges that its ads may have an impact on the outcome of federal elections, it claims that their primary purpose is to "focus on [a] legislative issue in question, not on any candidate" (Pl.'s Mot. Summ. J. at 10), and to "influenc[e] the votes of Senators Feingold and Kohl" before Congress adjourned. (Am. Ver. Compl. ¶ 12.) However, a genuine issue of material fact exists as to whether WRTL intended its ads to expressly advocate for the defeat of Senator Feingold.

Although the ads at issue do not explicitly encourage their listeners or viewers to oppose Senator Feingold, they do state that "[a] group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' . . . . Contact Senators Feingold and Kohl and tell them to oppose the filibuster." (Ver. Compl., Ex. A.) The structure of the ads further suggests that Senator Feingold might be one of the "group of Senators . . . causing gridlock and backing up some of our courts to the state of emergency." (*Id.*) Notably, the ads provide the listeners or viewers with no direct contact information for the Senators; instead, the ads direct the listeners or viewers to a website created by WRTL, www.befair.org, which featured e-alerts that "excoriat[ed]" Senator Feingold on the filibuster issue. (Def.'s Mot. Summ. J. at 29; Ex. 2 ¶ 21.) Thus, even a textual approach could suggest that if the ads were broadcast during BCRA's prohibited period, they might have implicitly discouraged Senator Feingold's re-election.

WRTL's role in the political environment that wrought the ad campaign in the first place could be probative of the intent of the ads. WRTL has opposed Senator Feingold since his election in 1992 and has used expenditures from its federal political action committee ("PAC") to support his political opponents. (*Id.*, Exs. 11, 12.) In 1998, WRTL spent more than $60,000 on independent expenditures to oppose Senator Feingold's reelection to a second term. (*Id.*, Ex. 11.) In 2004, Senator Feingold's reelection campaign coincided with the presidential election, and WRTL declared its "resolve to do everything possible to win Wisconsin for President Bush and to send Russ Feingold packing!" (*Id.*, Ex. 21.) WRTL made the defeat of Feingold "a priority." *Wis.*

Right to Life, Civil Action No. 04-1260, 2004 WL 3622736, at *1. WRTL endorsed through its PAC three of Senator Feingold's main opponents. (*Id.*, Ex. 54.) WRTL spent $7,500 on political literature that both supported Senator Feingold's opponents and explicitly opposed Senator Feingold (Intervenors's Opp'n to Pl.'s Mot. Summ. J. at 4-5), including a press release exhorting that "the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections." (*Id.*, Ex. 54.) WRTL's Executive Director Mary Lyons stated that the organization's "greatest challenge for 2004" as "to finish strongly in the elections," by "retir[ing] Senator Feingold." (*Id.*, Ex. 24 at 3.) The website referred to in the advertisements at issue, www.befair.org, explicitly attacked Feingold's record and encouraged website readers to defeat him. (*Id.*, Ex. 54.)

Senator Feingold's participation in judicial filibustering was a particular focus of criticism by WRTL, which distributed a voter guide endorsing one of Feingold's opponents who pledged to allow judicial nominees an up or down vote. (Def.'s Mot. Summ. J., Exs. 15 at 3, 24.) In the fall of 2004, WRTL's federal legislative director, Douglas Johnson, acknowledged that "it would certainly help if a few of the pro-abortion, pro-filibuster Democratic senators were replaced by pro-life Republicans, and that could happen." (Def.'s Mot. Summ. J., Ex. 24 at 5.) Senator Feingold's opponents also saw the filibuster issue as a key campaign issue. (*Id.*, Ex. 15 at 3-4.) One of Senator's Feingold's key opponents, Bob Welch, characterized Feingold's support of filibustering as partisan, calling "[t]he gridlock caused by Russ Feingold's partisanship . . . appalling . . . . Because of his ob-

structionism the wheels of justice are grinding to a halt." (*Id.*, Ex. 13.)

The reason for WRTL's shift to broadcast advertising and the import of its timing are in dispute. Through early 2004, WRTL used non-broadcast means to convey its criticism of Senate filibusters of President Bush's judicial candidates. (Def.'s Mot. Summ. J., Ex. 3 at 62-63.) Although filibusters of judicial nominees had occurred before then, WRTL had not run any broadcast advertisements on the issue before then. (*Id.*, Ex. 3 at 82.) However, around May of 2004, WRTL began planning a series of advertisements in opposition to filibustering. (Pl.'s Mot. Summ. J. at 6.) WRTL claims its shift to broadcast ads was because they were "the most effective form of communication for the present grass-roots lobbying campaign[.]" (Am. Ver. Compl. ¶ 51.) WRTL began broadcasting its advertisements on July 26, 2004, but stopped running those advertisements on August 15, 2004 because it believed that on that date, its ads would become prohibited electioneering communications as to Senator Feingold. (*Id.* ¶¶ 12, 14, 52.) WRTL claims it expected that filibuster votes would occur during times in which electioneering communications were regulated under BCRA (*id.* ¶ 6), namely, after August 15, 2004. In fact, the advertisements began airing in July, days after the last of the judicial filibuster cloture votes had occurred during that session and the Senate had departed for a six-week recess. (Def. Mot. Summ. J., Def.'s Stmt. Mat. Facts ("Def.'s Stmt. Mat. Facts") ¶ 69; Def.'s Mot. Summ. J., Ex. 35.) WRTL did not run any additional anti-filibustering ads after the 2004 election (Def.'s Mot. Summ. J., Ex. 48 at 8-10) in either 2004 or in 2005 during the height of the controversy. (*Id.* at 8.) The FEC insists that WRTL's decision to begin an advertising

campaign after the votes defeated the purpose of the campaign especially because "both WRTL's employee in charge of grass roots lobbying and its advertising agency lead consultant believe that it is important to run grassroots lobbying advertising shortly *before* legislative votes are to occur." (*Id.* at 8; Ex. 4 at 112; Ex. 5 at 30-31.)

The FEC argues that WRTL's ads are neither grassroots lobbying nor genuine issue ads; instead, they are express advocacy meant to encourage constituents to oppose Senator Feingold. Because of the timing of the ads, the defendants assert that the ads were intended to have an effect on the election and would have had such an effect if WRTL had run them during BCRA's prohibited electioneering communication period. The FEC maintains that "because the ads portray Senator Feingold in a negative light and clearly would influence the outcome of the election for which he was campaigning . . . [they] would have been one of the many messages that created an impression about Senator Feingold in the weeks before the election that would have informed voters' decisions about the upcoming election." (*Id.* at 10.)

The intent of the advertising campaign is a genuine issue of material fact, and neither side persuasively argues that no dispute about intent exists. WRTL claims that its 2004 broadcast advertising was generated by its opposition to judicial filibustering. The FEC counters that the advertising was meant to oppose Senator Feingold and was timed to affect the election, not any filibuster votes. WRTL insists that the timing of the campaign was geared toward a "Fall Showdown" in November 2004 which did not occur. (Pl.'s Mot. Summ. J. at 4.)

The timing issue alone requires that this case not be disposed of on summary judgment.

II. *Sham Issue Ads*

The FEC argues that even if this panel does not find that WRTL's advertising was express advocacy, the advertising campaign was intended to spark a lawsuit challenging the BCRA, making it sham issue advocacy. WRTL instead states that its advertising was "bona fide" grassroots lobbying that "expressed an opinion on pending Senate legislative activity, which was imminently up for a vote, and urged listeners to contact their Senators and to urge them to vote a certain way in the upcoming vote." (*Id.* at 10.) A genuine issue of material fact exists as to whether the advertising was intended to challenge BCRA, which would make the advertising sham issue advocacy.

The FEC notes that although WRTL had previously engaged in a number of different issue campaigns in the past, the judicial filibustering campaign was "distinct from the other activities of e-mailing [WRTL's] supporters." (Def.'s Mot. Summ. J., Ex. 4 at 105.) The FEC contends that WRTL's Executive Director was aware of the restrictions imposed by BCRA and was "hopeful that she would be able to get an exception [from the court] and continue running those ads." (*Id.*, Ex. 5 at 42.) The FEC's evidence, uncontested by WRTL, could suggest that the potential for the lawsuit shaped how the advertising campaign was coordinated and conducted. Jason Vanderground, a brand consultant hired to work on the filibustering campaign testified in his deposition that the impending lawsuit was discussed among members of WRTL's advertising team and he did research regarding the minimum number of households an ad would have to

reach in order to trigger the BCRA ban. *See* 2 U.S.C. § 434(f)(3)(C). He also researched the legal parameters of BCRA because he knew that "we were going to be creating advertising that would fall within what some of those laws addressed." (*Id.*, Ex. 5 at 47.) The contingency plan if this panel did not allow the ads to go forward was to "draw attention to the fact that the campaign was not allowed back on the air" by attacking the BCRA. (*Id.*, Ex. 5 at 84.) Vanderground also planned the advertising for a national market, which could make suspect WRTL's claim that the focus of its advertising was to encourage Wisconsin voters to call their Senators. The FEC argues that the actual goal was to spur a lawsuit that would have a national impact.

The parties also agree that language regarding the BCRA figured prominently, at least initially, in the judicial filibustering campaign. Vanderground proposed putting information on WRTL's *befair* website about both the judicial filibuster issue and "campaign finance reform." (*Id.*, Ex. 5 at 58.) Initial draft press releases primarily addressed the impact of the BCRA; Executive Director Lyons noted that one draft "is more about the BCRA than the filibuster." (*Id.*, Ex. 33 at 2.) This evidence fairly raises factual questions concerning the genesis of the ads as genuine issue ads.

The FEC asserts that WRTL chose to raise money for its general fund rather than its PAC. It argues that WRTL made a conscious decision not to possess in its PAC the requisite amount of funds needed for the advertising campaign. (Def.'s Stmt. Mat. Facts ¶¶ 112-21.) WRTL raised over $315,000 from corporations for its general fund in 2004. (Def.'s Mot. Summ. J. at 10.) Although WRTL's PAC raised approximately $155,000 in

the 1999-2000 election cycle, it had $13,766.90 in its coffers in 2004. WRTL claims that raising PAC money is difficult being "subject to source, amount, disclosure requirements, and donor resistance to such contributions." (Pl.'s Mot. Summ. J. at 12.) It also asserts that it could not have raised the requisite PAC funds to pay for the advertising campaign (*id.*, Ex. 1 ¶¶ 8, 11) even if it did not spend PAC money on other independent expenditures and contributions. However, the FEC retorts that PAC receipts nationally increased approximately 50% during the period between the 1999 and 2004 election cycles and "WRTL has provided no reason why fundraising was harder for its PAC than everybody else." (Def.'s Mot. Summ. J. at 11; Def.'s Stmt. Mat. Facts ¶ 117.) A permissible inference is that WRTL was unwilling to raise funds for its PAC so it would be forced to fund electioneering communications through its general fund and could create a challenge to the BCRA.

This evidence reveals a genuine dispute as to whether WRTL intended to use its advertisements as a test case, rendering them "sham" issue advocacy.

CONCLUSION

A genuine issue of material fact exists as to whether WRTL's 2004 advertisements were intended to influence a Senate election, or to spark litigation, or to be genuine issue ads. Because a resolution of that dispute is necessary—rather than a mere facial assessment of the ads' text—to determine whether BCRA may properly regulate the ads, this case cannot be resolved on cross-motions for summary judgment. Therefore, I respectfully

dissent from the majority's grant of summary judgment to WRTL.

12/21/06
Date

/s/ RICHARD W. ROBERTS
RICHARD W. ROBERTS
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 04-1260 (DBS, RWR, RJL)

THREE-JUDGE COURT

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION

AND

SEN JOHN MCCAIN, ET AL., INTERVENING DEFENDANTS

[Filed: Dec. 21, 2006]

ORDER

This matter having come before the Court upon the parties' cross-motions for summary judgment, and the Court having considered the motions, it is hereby

ORDERED that [#76] Plaintiff Wisconsin Right to Life's Motion for Summary Judgment is GRANTED; and it is further

ORDERED THAT [#81] Defendant Federal Election Commission's Motion for Summary Judgment is DENIED: and it is further

ORDERED that [#83] Intervening Defendants' Motion for Summary Judgment is DENIED

SO ORDERED.

/s/ DAVID B. SENTELLE
DAVID B. SENTELLE
United States Circuit Judge

/s/ RICHARD J. LEON
RICHARD J. LEON
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 04-1260 (DBS, RWR, RJL)

THREE-JUDGE COURT

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN, ET AL., INTERVENING DEFENDANTS

Dec. 28, 2006

ORDER

This matter having come before the Court upon the Federal Election Commission's motion for clarification and the Court having considered the motion, it is hereby

ORDERED that [#142] the Federal Election Commission's motion for clarification is GRANTED; and it is further

ORDERED, that there being no just reason to delay an appeal, the Order entered on December 21, 2006 is a final appealable order as to those issues decided in the opinion accompanying that order.

SO ORDERED.

/s/ DAVID B. SENTELLE
DAVID B. SENTELLE
United States Circuit Judge

/s/ RICHARD W. ROBERTS
RICHARD W. ROBERTS
United States District Judge

/s/ RICHARD J. LEON
RICHARD J. LEON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04CV01260 (DBS, RWR, RJL)

THREE-JUDGE COURT

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN, ET AL.,INTERVENING DEFENDANTS

[Filed: Dec. 29, 2006]

NOTICE OF APPEAL

Notice is hereby given that the Federal Election Commission, defendant in the above named case, appeals to the Supreme Court of the United States from the decision entered in this action on December 21, 2006 and the order entered on December 28, 2006.

Respectfully submitted,

/s/
Lawrence H. Norton
General Counsel

/s/
Richard B. Bader
Associate General Counsel
(D.C. Bar #911073)

/s/
David Kolker
Assistant General Counsel
(D.C. Bar #394558)

/s/
Greg J. Mueller
Attorney
(D.C. Bar #462840)

FOR THE DEFENDANT
FEDERAL ELECTION
COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650
(202) 219-0260 (FAX)

December 29, 2006

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Nos. CIV.04-1260DBS, CIV 04-1260RWR,
CIV04-1260RJL

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

May 10, 2005

MEMORANDUM OPINION AND ORDER

SENTELLE, J.

In the present action, plaintiff Wisconsin Right To Life, Inc. ("WRTL") seeks a judgment declaring portions of the Federal Election Campaign Act, as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), unconstitutional as applied to it under the facts set forth in its complaint. WRTL also sought preliminary injunctive relief preventing the defendant, Federal Election Commission ("FEC"), from enforcing the contested portions of BCRA against it.

On August 17, 2004, the Court denied WRTL's motion for preliminary injunctive relief. In denying

WRTL's motion, the Court held that "the reasoning of [the Supreme Court in *McConnell* v. *Federal Election Commission*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed .2d 491 (2003)] leaves no room for the kind of 'as-applied' challenge" to BCRA asserted by WRTL, even though the *McConnell* Court "was considering a facial challenge. . . ." Mem. Op. at 4. After denying WRTL's motion, the Court ordered the parties to submit supplemental memoranda addressing the issue of whether the case should be dismissed in light of the Court's ruling. The issue now ripe for review, and after due consideration of the parties' supplemental memoranda and the entire record herein, the Court for the reasons set forth in its prior opinion holds that WRTL's "as-applied" challenge to BCRA is foreclosed by the Supreme Court's decision in *McConnell*. Accordingly, WRTL's case is dismissed with prejudice.

This the 9 day of May, 2005.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. CIV.04-1260 DBS, RWR, RJ

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

Aug. 17, 2004

MEMORANDUM OPINION AND ORDER

LEON, J.

This matter coming before the court on plaintiff's motion for a preliminary injunction, and the court having considered the affidavits and representations of counsel, solely for the purpose of the motion for a preliminary injunction, the court makes the following findings of fact:

1. Plaintiff Wisconsin Right to Life, Inc. (WRTL) is a nonprofit, nonstock, Wisconsin, ideological advocacy corporation recognized by the Internal Revenue Service as tax-exempt under § 501(c)(4) of the Internal Revenue Code.

2. Defendant Federal Election Commission (FEC) is the government agency charged with enforcing the

relevant provisions of the Federal Election Campaign Act, as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA).

3. WRTL admits that it does not qualify for any exception permitting it to pay for electioneering communications from corproate funds because (1) it is not a "qualified nonprofit corporation" (QNC) within the definition of 11 C.F.R. § 114.10 so as to qualify for the exception found at 11 C.F.R. § 114.2(b)(2) to the electioneering communication prohibition and (b) its advertisements are "targeted" so that it does not fit the exception for § 501(c)(4) organizations as described in 2 U.S.C. § 441b(c)(2). 2 U.S.C. § 441b(c)(6)(A).

4. U.S. Senator Russell Feingold of Wisconsin is running for reelection this year.

5. As early as September, 2003, candidates opposing Senator Feingold made Senator Feingold's support of Senate filibusters against judicial nominees a campaign issue, Def.' Opp'n to Pl.'s Mot. for Prelim. Inj. (Def.'s Opp'n) Exh. 10-14.

6. WRTL maintains a political action committee (PAC).

7. In March 2004, WRTL's PAC endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority. Def.'s Opp'n Ex. 4, 5, 6, 7.

8. In a news release on July 14, 2004, WRTL criticized Senator Feingold's record on Senate filibusters against judicial nominees. Def.'s Opp'n Exh. 16.

9. WRTL had used a variety of non-broadcast communications to convey its criticism of Senate filibusters

against judicial nominees in the months leading up to August 2004.

10. WRTL is now paying to broadcast on television and radio a series of advertisements inclusive of those depicted in Exhibits A, B, and C to the complaint and attached as Exhibits A, B, and C hereto, all of which refer to and will continue to refer to and clearly identify Senator Russell Feingold.

11. The Wisconsin primary for the office for which Senator Feingold is a candidate will occur thirty days after August 15, 2004. The general election will occur November 2, 2004.

12. WRTL anticipates that its ongoing advertisements will be considered electioneering communications for purposes of federal statutory and regulatory definitions under 2 U.S.C. § 434(f)(3) and 11 C.F.R. §100.29 during the period between August 15, 2004, and November 2, 2004.

LEGAL CONCLUSIONS AND ANALYSIS

Plaintiff Wisconsin Right to Life seeks a judgment declaring portions of the BCRA unconstitutional as applied to it under the facts set forth in its complaint, and it seeks preliminary injunctive relief preventing FEC enforcement of those portions of BCRA against it.

The focus of the litigation is 2 U.S.C. § 441b, which regulates the extent to which such corporations as WRTL may finance and produce "applicable electioneering communications," which are defined at 2 U.S.C. § 434(f)(3) as being "any broadcast, cable, or satellite communication which (I) refers to a clearly identified candidate for Federal office; (II) is made within (aa) 60 days before a general . . . election . . . ; or (bb) 30

days before a primary . . . election; and (III) . . . is targeted to the relevant electorate."

In this case, WRTL cites three specific ads, first aired July 26, which contain references to Sen. Russell Feingold, currently the sole Democrat contender for the Senate seat. Complaint 5. As the primary election occurs on September 14 and the general election occurs on November 2, BCRA's (in this case, overlapping) "blackout" periods prohibit the airing of the advertisements from August 15 until November 2. *Id.* at 6.

WRTL's prayer for relief is sweeping, seeking both declaratory and injunctive relief declaring 2 U.S.C. § 441b unconstitutional as applied to "electioneering communications . . . that constitute grass-roots lobbying," and specifically as applied to the three advertisements incorporated in its complaint. Complaint 13. However, the motion before us today concerns only its motion for a preliminary injunction. The standards for the granting of a preliminary injunction are familiar. To prevail, a plaintiff seeking such relief must demonstrate: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable harm if an injunction is not granted; (3) that an injunction would not cause substantial injury to other parties; and (4) that the public interest would be furthered by the injunction. *See, e.g.*, *CityFed Fin. Corp.* v. *Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995). Plaintiff's showing in the present litigation cannot survive this standard.

First WRTL has not established that it has a substantial likelihood of success on the merits. Just last year, in *McConnell* v. *Federal Election Commission*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003), the Supreme Court upheld the electioneering communication

provisions of the BCRA in their entirety. *Id.* at 686-700. WRTL is correct that in *McConnell* the Court was considering a facial challenge while the current challenge subjects the statute to constitutional anlaysis in the context of its specific application, but the reasoning of the *McConnell* Court leaves no room for the kind of "as applied" challenge WRTL propounds before us. More specifically, the Court noted that the statute included a "back up" definition of electioneering communications, 2 U.S.C. § 434(f)(3)(A)(I), to take effect only if the primary definition were held to be "constitutionally insufficient." The Court expressly stated that it need not rule on the constitutionality of that back up provision because "*we uphold all applications of the primary definition* and accordingly have no occasion to discuss the backup definition." 124 S. Ct. 687 n.37 (emphasis added). The Court's deliberate declaration of its ruling as encompassing "all applications of the primary definition" suggests little likelihood of success for an "as applied" challenge to some applications of that definition, such as the one plaintiff brings before us.

Furthermore, the Court's deliberate upholding of "all applications" stands in informative contrast to its explicit acknowledgment that the other parts of the statute which it upheld against facial challenge might be subject to "as applied" challenges in the future. For example, the Court upheld a Title I provision of BCRA restricting state parties from spending "soft money for federal election activities." 2 U.S.C. § 441i(b). But the Court stated that "as applied challenges remain available" if some future state party could show that the restriction had become "'so radical in effect as to . . . drive the sound of [the recipient's] voice below the level of notice.'" *Id.* at 677 (brackets in the original) (quoting *Nixon* v.

Shrink Missouri Gov't PAC, 528 U.S. 377, 397, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000)). Similarly, in upholding the ban on soft money fundraising by national party committees, 2 U.S.C. § 441i(a), the Court noted that "'a nascent or struggling minor party can bring an as-applied challenge" should the ban prevent it from "amassing the resources necessary for effective advocacy.'" *Id.* at 669 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 21, 96 S. Ct. 612, 46 L. Ed. 2d (1976)).

Again, in upholding the Title V recordkeeping requirement on broadcasters, the Court noted that the regulated entities "remain free to challenge the provisions, as interpreted by the FCC in regulations, or as otherwise applied." *Id.* at 717. And finally, the Court noted that its ruling upholding against facial challenge the § 201 disclosure provisions of Title II "does not foreclose possible future challenges to particular applications" of that statutory requirement. *Id.* at 692.

While these dicta concerning the possible future facial challenges to other provisions do not preclude the possibility that the Supreme Court might uphold an as-applied challenge to the provisions before us, in the face of the strength of the Court's holding with specific reference to these provisions, we cannot possibly conclude that plaintiff has made out a substantial likelihood of success on the merits.

Our reading of *McConnell* that as-applied challenges to § 441b are foreclosed is but one reason we find little likelihood of success on the merits. The facts suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating. *Id.* at 695. In *McConnell*, the Court voiced the suspicion of corporate funding of

broadcast advertisements just before an election blackout season because such broadcast advertisements "will often convey [a] message of support or opposition" regarding candidates. *Id.* at 651, 697, 715. Here, WRTL and WRTL's PAC used other print and electronic media to publicize its filibuster message-a campaign issue-during the months prior to the electioneering blackout period, and only as the blackout period approached did WRTL switch to broadcast media. (See Def.'s Opp. Exh. 4, 16, 18.) This followed the PAC endorsing opponents seeking to unseat a candidate whom WRTL names in its broadcast advertisement (Def.'s Opp. Exh. 10-14), and the PAC announcing as a priority "sending Feingold packing." (Def.'s Opp'n Exh. 4.)

As to the second part of the preliminary injunction standard, we hold that plaintiff has not demonstrated that it will suffer irreparable harm in the absence of a preliminary injunction. Plaintiff relies on the general statement that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). Unquestionably, as a general proposition of law, that statement is true. However, in adjudicating entitlement of a plaintiff to a preliminary injunction, we must apply the whole four-part test, which requires us to determine whether the "balance of harms favor[s] plaintiffs." *Twelve John Does* v. *District of Columbia*, 841 F.2d 1133, 1137 (D.C. Cir. 1988). That said, the actual limitation on plaintiff's freedom of expression, as protected by the First Amendment, is not nearly so great as plaintiff argues. At least for purposes of a preliminary injunction, the present showing appears to be that plaintiff is not precluded from forwarding its message, or even from exposing the

public to the particular advertisements at issue. As we understand it, the BCRA does not prohibit the sort of speech plaintiff would undertake, but only requires that corporations and unions engaging in such speech must channel their spending through political action committees (PACs).[1] In *McConnell*, the Supreme Court noted that though "corporations . . . may not use their general treasury funds to finance electioneering communications, . . . they remain free to organize and administer segregated funds, or PACs, for that purpose." *Id.* at 695. The Court went on to reason that "'the PAC option allows corporate political participation without the temptation to use corporate funds for political influence. . . .'" *Id.* (quoting *Federal Election Commission* v. *Beaumont*, 539 U.S. 146, 123 S. Ct. 2200, 2211, 156 L. Ed. 2d 179 (2003)).

The *Beaumont* decision quoted by the Supreme Court in *McConnell*, while not directly on point as it did not deal with the current statute, is instructive. That case involved a challenge to the regulation of a corporation's political contributions while the present involves regulation of electioneering communications. Nonetheless, the analogy is obvious. In *Beaumont*, the Supreme Court endorsed the constitutional adequacy of "the PAC option." That holding by the Supreme Court not only weighs against the likelihood of success on the merits, but it also suggests that plaintiff has not advanced a strong case of irreparable harm in the absence of a pre-

[1] WRTL also has alternative methods available to communicate its message in addition to using PAC funding for broadcast ads, namely, using print media, such as newspaper or magazine advertisements, press releases, pamphlets, informational mailings, and billboards; using electronic communications, such as e-mailing and internet posting; and placing telephone calls.

liminary injunction. Certainly, it suggests that the harm established by plaintiff will not weigh much in the balance against potential harm to others under the third step of the test or against the public interest under the fourth. Therefore, WRTL has failed the second as well as the first step of the four-part test.

Given the absence of merit in plaintiff's case on the first element of the preliminary injunction test and the near-total absence of irreparable harm to the plaintiff under the second, we need not linger long over the third or fourth elements. The harm to the opposing party, the Federal Election Commission, is evident. Everyone agrees that it is the statutory duty of the defendant to enforce the BCRA. If we enter the preliminary injunction, then, to the extent of that injunction, the Commission cannot perform its duty. We hold that an injunction against the performance of its statutory duty constitutes a substantial injury to the Commission, although given plaintiff's failure on the first two elements, we do not consider that showing essential to our denial of the preliminary injunction.

Similary, since plaintiff has not established any entitlement to a preliminary injunction, it is not essential that we determine that the grant of such an injunction would fail to further the public interest, but for the sake of completion of record for the purposes of any review that might be sought, we do hold that plaintiff has not established that the public interest would be furthered by the injunction. The Supreme Court has already determined that the provisions of the BCRA serve compelling government interests. *See McConnell*, 124 S. Ct. at 695-96. To the extent that the injunction of the proposed application of those provisions interferes with the

exception of the statute upheld by the Supreme Court in *McConnell*, the public interest is already established by the Court's holding and by Congress's enactment, and the interference therewith is inherent in the injunction.

In short, plaintiff's case falls far short of the four-part test for the grant of a preliminary injunction. Therefore, we have denied plaintiff's motion. In light of this disposition, we further order that the parties hereto file supplemental memoranda within ten days of the date of this memorandum and order addressing the question whether this matter should be dismissed.

Exhibit A

Radio Script
Client: Wisconsin Right to Life
Title: "Wedding":60
Job #: WRL-8136
Date: July 15, 2004

AUDIO	TALENT
We hear church bells up and under . . .	PASTOR: And who gives this woman to be married to this man?
	BRIDE'S FATHER rambling):
	Well, as father of the bride, I certainly could.
	But instead, I'd like to share a few tips on how to properly install dry

wall. Now you put the dry wall up . . .

VO:

Sometimes it's just not fair to delay an important decision.

But in Washington It's happening. A group of Senators is using the filibuser delay tactic to block federal judicial nominees from a sim ple "yes" or "no" vote. So qualified candidates don't get a chance to serve.

Yes, it's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

BRIDE'S FATHER (rambling): Then you get your joint compound and your joint tape and put the tape up over . . .

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Vist: BeFair.org. That's (befair.org Paid for by Wisconsin Right to Life (be fair. org), which is responsible for the content

of this advertising and not authorized by any candidate or candidate's committee.

Exhibit B

Radio Script
Client: Wisconsin Right to Life
Title: "Loan" :60
Job#: WRL-8136
Date: July 14, 2004
AUDIO TALENT

LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, inspections, and well . . .

COUPLE: Yes, yes . . . we're listening.

OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River in Waupaca . . .

VO: Sometimes it's just not fair to delay an important decision.

But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates aren't getting a chance to serve.

It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

EXHIBIT C

TV Script
Client: Wisconsin Right to Life
Title: "Waiting" :30
Job#: WRL-8136
Date: July 14, 2004

VIDEO	AUDIO
We see vignettes of a middle-age man being as productive as possible while his professional life is in limbo: He reads the morning paper	VO:
He polishes his shoes	There are a lot of judicial nominees out there who
He checks for mail, which hasn't arrived	can't go to work.
He scans through his Rolodex	
He reads his Palm Pilot manual	Their careers are put on hold because a group of U.S. Senators is
He pays bills	fillbustering-blocking qualified nominees from a simple "yes" or "no" vote. It's politics at work and it's causing gridlock.
	Contact Senators Feingold and Kohl and tell them to

	oppose the filibuster.
SUPER: www.BeFair.org	Vist: BeFair.org
4-SECOND DISCLAIMER *(4% or 20 scan lines):* Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising, not authorized by any candidate or candidate's committee. content of this advertising.	WRL REPRESENTATIVE VO: Wisconsin Right to Life is responsible for the content of this advertising.

Nos. 06-969 & 06-970

In The

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Appellant*

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*

SEN. JOHN MCCAIN ET AL., *Intervenor-Appellants*

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*

On Appeal from the United States District Court
for the District of Columbia

Brief for Appellee

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Jeffrey P. Gallant
Raeanna S. Moore
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434
812/235-3685 (facsimile)
Lead Counsel for WRTL

M. Miller Baker
Michael S. Nadel
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, DC 20005-3096
202/756-8000
202/756-8087 (facsimile)
Counsel for WRTL

March 2006

QUESTIONS PRESENTED

1. Whether this case is within the exception to mootness for matters capable of repetition yet evading review.

2. Whether the electioneering communication prohibition at 2 U.S.C. § 441b is unconstitutional as applied to the facts of this case, and particularly

(a) the three specific grassroots lobbying broadcast communications sponsored by Wisconsin Right to Life, Inc. ("WRTL") here and/or

(b) genuine grassroots lobbying communications,

with any communications to be funded from a general corporate account or, alternatively, from a separate bank account to which only qualified individuals may donate, as defined in 2 U.S.C. § 434(f)(2)(E).

3. Whether this Court's facial upholding of the electioneering communication prohibition in *McConnell v. FEC*, 540 U.S. 93 (2003), must be overturned because (a) Appellants insist that WRTL's ads are in the "heartland" or "core" of what Congress intended to restrict with the electioneering communication prohibition and (b) in practice the remedy of as-applied challenges to protect genuine issue ads has proven inadequate.

CORPORATE DISCLOSURE STATEMENT

Wisconsin Right to Life, Inc. has no parent corporation and is a nonstock corporation, so no publicly held company owns ten percent or more of its stock. Rule 29.6.

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STATEMENT

1. *Roots of This Case.* The deep roots of this case lie not in the Bipartisan Campaign Reform Act of 2002, the Federal Election Campaign Act of 1971, the Taft-Hartley Act of 1947, the Tillman Act of 1907, nor even the First Amendment, but in the struggle of the Anglo-American people to (a) establish themselves as sovereign and (b) curb the power of government officials to prevent the people from criticizing official actions.[1]

"[I]n the three centuries prior to the Declaration of Independence, the King required the suppression of ideas antagonistic to the Crown" by sedition laws, control of the press, and constructive treason. Nowak, Rotunda & Young, *Constitutional Law* at 830. The Star Chamber developed the doctrine that the King originated justice and was above criticism, without regard to truth (truth merely enhanced the libel). *Id.* at 831 (citations omitted). There was also the prior restraint of government licensing before publication could be lawful. *Id.*[2]

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[1]In the Middle Ages, religious authority established political authority, and religious and governmental authorities who believed that they ruled infallibly by divine right sought to suppress popular opinion. John E. Nowak, Ronald R. Rotunda & J. Nelson Young, *Constitutional Law* at 830 (3d ed. 1986) [hereinafter Nowak, Rotunda & Young, *Constitutional Law*]. "Dissent from this authority meant not only to be wrong, but to be damned." *Id.* As governments became less accountable to religious authorities, government officials yet felt it "essential . . . that the popular opinion of the government be preserved" to facilitate taxation and conscription. *Id.* (citation omitted).

[2]A leading light in the reform effort that ultimately led to the First Amendment was John Milton, who battled English censors and wrote this eloquent defense of liberty in 1644: "[T]hough all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licencing and prohibiting, to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors in a free and open encounter?" John Milton, *Aeropagitica* 51-52 (John W. Hales, ed., 3d. ed. 1882).

These oppressive practices were carried into the American colonies, as was the original reform movement, which was the effort to restrict the government's ability to prevent the people from discussing public issues and public officials' conduct of their office. *Id.* at 832.[3] The Framers of the American Constitution protected the people by limiting government powers, and in 1791 the people ratified the First Amendment, mandating that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. This great reform victory was aimed directly at halting incumbent politicians' efforts to silence criticism about their actions.[4] America had adopted the marketplace of ideas. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

Despite the First Amendment, politicians persisted in efforts to silence criticism with enactment of the Sedition Act of 1798.[5] The Sedition Act "first crystallized a national awareness of the central meaning of the First Amendment." *New York Times v.*

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[3]By 1765, when Blackstone first published his *Commentaries*, the battle against prior restraints had been largely won, but publishers were yet subject to seditious libel laws. Nowak, Rotunda & Young, *Constitutional Law* at 832-33 (*citing Commentaries on the Laws of England*, Book IV pp. *151-52 (T. Cooley, ed.: 2d ed., rev. ed. 1872)).

[4]These visionaries saw that "a central value of the free press, speech, and assembly lies in 'checking' the abuse of power by government officials" and it is necessary to avoid the "slippery slope" of giving government power to restrict speech "when a government's natural inclination is moving the line towards more suppression of criticism and unpopular ideas." Nowak, Rotunda & Young, *Constitutional Law* at 836.

[5]The Act barred "publishing any false, scandalous and malicious writing . . . against the government . . . , or . . . Congress . . . or the President . . . with intent to defame . . . or to bring them . . . into contempt or disrepute . . . ." 1 Stat. at Large 596 (truth was a defense).

Sullivan, 376 U.S. 254, 273 (1964). The Act was attacked as unconstitutional by Jefferson, Madison, and the Virginia General Assembly, the latter condemning it for restricting "'the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.'" *Id.* at 274 (citation omitted). Madison wrote the protest Report,[6] founding his argument on the fact that the "Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty,'" *id.* at 274 (citation omitted), and in the House of Representatives Madison also observed: "'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.'" *Id.* at 275. "The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government." *Id.* at 275. As a result, "the court of history" had reached a "broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *Id.* at

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[6]The Report noted the lack of accountability that would result if officials were free of ongoing public scrutiny and discussion of their actions:

> It is manifestly impossible to punish the *intent* to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; . . . which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct. Nor can there be a doubt . . . that a government thus intrenched in penal statutes against the just and natural effects of a culpable administration, will easily evade the responsibility which is essential to a faithful discharge of its duty.

New York Times, 376 U.S. at 275 n.15 (quotation marks and citation omitted) (emphasis added).

276. The Act expired in 1801, and those convicted under it were pardoned and their fines remitted by President Jefferson. *Id.* & n.16.

Bridges v. California, 314 U.S. 252 (1941), dealt with another effort to silence criticism, this time of judges, where individuals, who had published stories about pending cases were fined for contempt of court. *Id.* at 258. This Court rejected reliance on English common law allowing such speech suppression because "'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.'" *Id.* at 264 (citation omitted). The Court noted the asserted "substantive evil" of "disrespect for the judiciary," *id.* at 270, which included "*criticism* of the decision of the court," *id.* at 270 n.15 (emphasis added), and rejected the "assumption that respect for the judiciary can be won by shielding judges from published *criticism*." *Id.* at 270 (emphasis added). The Court said "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *id.* (footnote omitted), and concluded that "an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than . . . enhance respect. *Id.* at 270-71.

In 1964, *New York Times v. Sullivan*, 376 U.S. 254, dealt with another effort by politicians to silence criticism. Despite the libel immunity that public officials enjoy for their public debate (in order to encourage robust debate), Alabama's libel law provided no similar immunity to the people's discussion of public officials' actions. A group supporting Dr. Martin Luther King, Jr. took out a *New York Times* ad criticizing the actions of police in Montgomery, Alabama against civil-rights demonstrators. The city commissioner in charge of police claimed that the ad libeled him by implication. *Id.* at 288. This Court established the "actual malice" standard for discussing public officials, reaffirming "a profound national commitment to the

principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

This struggle of the government to silence the people continues here as BCRA sponsors, Intervenors herein, defend the "electioneering communication" prohibition[7] by declaring that quashing criticism is the true intent behind the provision and thus argue that broadcast ads are sham, not genuine, if the ads (a) "took a *critical* stance regarding a candidate's position on an issue" and (b) "referred to the candidate by name." Intervenors' Br. at 22 (emphasis added). Intervenors' Brief is replete with complaints about Senators being criticized for their positions on a current legislative matter. *See id.* at 3, 10, 11, 15, 16, 22, 23 n.11, 24, 25 n.14, 27, 28, 36. So is the FEC's Brief. *See* FEC Br. at 10, 11, 19, 20, 33, 44, 48.

The roots of this case also lie in the right of the people to engage in self-government by employing their First Amendment liberties to amplify their voices through associating, *see Buckley v. Valeo*, 424 U.S. 1, 15 (1976) and in the unquestioned right of corporations to freely advocate issues. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978). So with respect to "*genuine issue ads*," *McConnell v. FEC*, 540 U.S. 93, 206 n.88 (2003) (emphasis added), there is no corporate-form interest to justify a *prohibition*. Historically, the Constitution and this Court have protected corporate expression about public policy generally and about the adoption of laws specifically. Thus, pro-

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[7] "Prohibition" herein refers to 2 U.S.C. §§ 441b(a)-(b)(2) (2004) ("It is unlawful for any . . . corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election . . . . '[C]ontribution or expenditure' includes . . . any applicable electioneering communication."). "Prohibition" is an appropriate term because it was used by Congress, BCRA § 203 (entitled "Prohibition of Corporate and Labor Disbursements for Electioneering Communications"), and this Court. *McConnell*, 540 U.S. at 203 (same). Despite the possibility of a PAC-option, a corporation is still *prohibited* from using its own general funds.

hibiting corporations from effective grassroots lobbying has no hoary heritage. Rather, banning corporate grassroots lobbying in "genuine issue ads" is a recent innovation that was spawned in 1947, halted by this Court in 1976, respawned in 2002, and identified by this Court as likely unconstitutional in 2003.[8]

Roots of this case also lie in the passage of BCRA,[9] wherein sponsors of the provision that became the present prohibition promised to protect "genuine issue ads" and particularly grassroots lobbying. *See infra* at Part IV.A. And on the floor, sponsors promoted a provision to authorize the FEC to make

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[8]The Tillman Act only restricted corporate "*contributions* in connection with any election to public office," 34 Stat. 864-65 (emphasis added), so it has nothing to do with the present case, which is about WRTL's own expression. Not until *1947* did Congress try to limit corporate *expenditures* in the Taft-Hartley Act, which limitation was only in full effect until this Court had an opportunity to address it in *Buckley*. 424 U.S. 1. Then this Court noted (a) the vagueness of regulating "any expenditure . . . relative to a clearly identified candidate," *id.* at 42, (b) the fact that "incumbents[] are intimately tied to public issues involving legislative proposals and governmental actions," *id.* at 43, and (c) the rejection of any "'intent and . . . effect'" test in *Thomas v. Collins*, 323 U.S. 516, 535 (1945), and imposed the express advocacy construction to protect a speaker from being "'at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.'" *Buckley*, 424 U.S. at 42 (*quoting Thomas*, 323 U.S. at 535). The prohibition on corporate independent expenditures was also restricted to express advocacy in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("*MCFL*"). Under the express advocacy test, WRTL is completely free to run its grassroots lobbying ads. Only in 2002, did Congress again seek to limit such legislative advocacy with its electioneering communication prohibition in BCRA, and even then there was a recognition of the constitutional need to protect the people's right to petition through grassroots lobbying, *see infra* at Part IV.A and this Court in *McConnell* "assume[d]" that as to "genuine issue ads" the prohibition might not survive challenge. 540 U.S. at 206 n.88.

[9]BCRA was supposed to restore the people's trust in government, but instead it declined. *See* The American National Election Studies, "Trust in Government Index 1958-2004" (2002 score of 43 down to 37 in 2004), available at http://www.electionstudies.org/nesguide/toptable/tab5a_5.htm.

exemptions in order to protect "genuine issue ads," *id.*, which led to a 2002 FEC rulemaking on the prohibition, in which the FEC solicited comments on proposed language for a rule exempting grassroots lobbying and then refused to make a rule. *See infra* at Part IV.A-B.[10]

Roots lie in the *McConnell* litigation where *genuine issue ad* was a term of art and specific ads were identified as "genuine issue ads" or sham ads. For example, all three district court judges noted that a grassroots lobbying ad—called herein the "PBA Ad"—was recognized by key defense expert Prof. Goldstein as a "genuine issue ad."[11] As set out below, *infra* at Part IV, this PBA Ad is remarkably like WRTL's ads, proving that they are also "genuine issue ads." Judge Leon also listed "representative examples" of both "genuine issue advertise-

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[10]BCRA prime sponsors and campaign finance reform lobby groups joined in proposing rules to distinguish genuine issue ads from sham ads by focusing on the content of the ads without any investigation into intent-and-effect context. *See infra* at Part IV.B Yet the FEC rejected their rules, along with their rationale, and refused to make a rule. *See infra* at Part IV.A. In 2006, the FEC was twice more asked to make a rule and twice refused, *id.*- even after the Solicitor General was asked at oral argument why the FEC had not made a rule to protect grassroots lobbying, Transcript of Oral Arg. at 43-44 *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410, 126 S. Ct. 1016 (2006) ("*WRTL I*") (No. 04-1581), and the unanimous opinion of the Court took note of its ability to do so. 546 U.S. 410, 126 S. Ct at 1017.

[11]*McConnell v. FEC*, 251 F. Supp. 2d 176, 312 (D.D.C. 2003) (Henderson, J.), 905 (Leon, J.), 748 (Kollar-Kotelly, J.). This "genuine issue ad" was originally called the "Feingold Kohl Abortion 60 Ad" but for ease of memory is called the "PBA Ad" because its topic is partial-birth abortion ("PBA"). Furthermore, the Brennan Center's *Buying Time* reports, which played a central role in *McConnell* and were based on Goldstein's work, acknowledged that the prohibition swept in "genuine issue ads." The key question by which Goldstein's student coders distinguished genuine from sham issue ads was Question 6: "'In your opinion, is the purpose of this ad to provide information about or urge action on a bill or issue, or is to generate support or opposition for a particular **candidate**.'" *McConnell*, 251 F. Supp. 2d at 308-09 (Henderson, J.) (citation omitted) (emphasis in original question).

ments" and "candidate-centered issue advertisements."[12] So when this Court in *McConnell* "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," 540 U.S. at 206 n.88, these genuine issue ads were before the Court. The whole *McConnell* facial analysis of the prohibition was to determine whether it swept in too many of these "genuine issue ads." *Id.* at 203-07.

2. *Present Appeals.* The present appeals arise from a constitutional challenge to the electioneering communication prohibition as applied to WRTL's grassroots lobbying ads. In July 2004, Senate filibustering of President Bush's judicial nominees had reached unprecedented, double-digit levels and was coming to a head. Helen Dewar, *Senate Democrats Block 3 More Bush Judicial Nominees*, Washington Post, July 23, 2004, at A05; Record 30:3 (*AVC* ¶ 10).[13] WRTL launched a grassroots lobbying campaign to encourage its Senators to oppose the filibuster. Record 30:3-4, 7-8 (*AVC* ¶¶ 12-13, 25-33).[14] From August 15 to November 2, 2004 (80 days, including

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[12] *Id.* at 914-18. For analytical convenience, a number of ads (including all *five* of WRTL's grassroots lobbying ads in the record and the ad at issue in *Christian Civic League of Maine, Inc. v. FEC* (No. 06-589 in this Court) ("*CCLM*")) have been collected in the Appendix to James Bopp, Jr. & Richard E. Coleson, *Distinguishing "Genuine" from "Sham" in Grassroots Lobbying: Protecting the Right to Petition During Elections*, 29 Camp. L. Rev. 353 (2007) [hereinafter Bopp & Coleson, *Distinguishing*] (print version forthcoming 2007) (Article currently accessible online at www.law.campbell.edu/lawreview, by following the "Issue – Full text" link, then following the "Volume 29, Number 3 – Spring 2007" link.). The Appendix also assists analysis by collecting several proposed tests—including by Intervenors and their counsel—to distinguish genuine issue ads from sham ads.

[13] On July 21, the Senate failed to invoke cloture on the ongoing filibuster of the nomination of William Gerry Myers III as a judge on the U.S. Court of Appeal for the Ninth Circuit. Record 30:3 (*Amended Verified Complaint* ¶ 8 ("*AVC*")); 150 Cong. Rec. S8459-60. A fall showdown was predicted. Record 30:3 (*AVC* ¶¶ 8-11); Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1.

[14] On July 26, 2004, WRTL began broadcasting a radio advertisement

November 2), WRTL's ads would have been prohibited electioneering communications.[15]

Broadcast advertisements are the most effective form of communication for a grassroots lobbying campaign.[16] While WRTL did not believe that it was constitutionally required to use PAC funds for what it regards as constitutionally protected "genuine issue ads," using funds from WRTL's federal political committee fund ("WRTL-PAC") was an inadequate option.[17]

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entitled "Wedding," Record 30:3 (*AVC* ¶ 12), JS App.3a, and also broadcast two other ads before all broadcasting was halted by the prohibition. (The text of "Wedding" and the other two ads broadcast, "Loan" and "Waiting" are at JS App. 3a n.3, 4a n.4, and 5a n.5, respectively). WRTL intended to continue broadcasting its grassroots lobbying ads, and materially similar ads, throughout August 2004 and until the matter was voted on in the fall. Record 30:3-4, 7 (*AVC* ¶¶ 12-13, 28-29); JS App. 6a.

[15]Record 30:2, 4, 6 (*AVC* ¶ 6, 13-14, 23-34); JS App. 6a-7a. From August 15 to September 3 (30 days before the primary election), the prohibition existed solely because of Wisconsin's September primary, during which Sen. Feingold ran *unopposed*, as noted by Appellants' amici curiae Briffault and Hasen. *See* Briffault & Hasen A.C. Br. at 25 n.9. These amici suggest that an exemption might be appropriate where a candidate is running unopposed, and note that, in the *CCLM* case (No. 06-589), Sen. Snowe was running unopposed in her primary. *Id.* Judge Kollar-Kotelly apparently agreed, claiming that the "uncontroverted record" in *McConnell* showed that genuine issue ads could be distinguished from "candidate-centered issue advocacy" on three criteria, the third being "if the advertisement is run in a competitive race." *McConnell*, 251 F. Supp. 2d at 567.

[16]Non-broadcast communications would not have provided WRTL with sufficient ability to reach people with WRTL's message. Record 30:10 (*AVC* ¶ 51). In *McConnell*, Judge Kollar-Kotelly expressly found that other means of communication were less effective (and some were more expensive) than broadcasting. 251 F. Supp. 2d at 569-73 (*citing* various experts).

[17]As of August 6, 2004, WRTL-PAC had $13,766.90 in its account. And these were the only funds that WRTL could use for federal candidate contributions and independent expenditures. 2 U.S.C. § 431(8) and (17) (definitions). If these funds were used for the grassroots lobbying ads, they would not have been available for the contributions and independent expenditures that WRTL-PAC intended to make, Record 76, Attachment 1

So on July 28, 2004,WRTL filed its verified complaint and sought a preliminary injunction to permit continued running of its ads past the August 15th beginning of the prohibition period. WRTL challenged the *prohibition*, not *disclosure*, and was prepared to provide the full disclosure required under BCRA.[18]

The preliminary injunction was denied on August 12, 2004, and WRTL ceased broadcasting because its ads were prohibited. The district court dismissed the case on the basis that the language and logic of *McConnell* precluded as-applied challenges and added that "'WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating,'" *WRTL I*, 546 U.S. 410, 126 S. Ct. at 1018 (citation omitted).

In *WRTL I*, the FEC argued that *McConnell*'s approval of the "bright-line" "electioneering communication" precluded as-applied exemptions and that WRTL's ads were not genuine issue ads. *Id.* Despite these arguments, this Court unanimously remanded the case for consideration of the merits of the as-applied challenge.[19]

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at 3-4 (Lyons Affid. ¶¶ 1-7), and were not sufficient for the planned grassroots lobbying advertising expenditures of $100,000. *Id.* at 6 (Lyons Affid. ¶ 14). PAC money is also difficult to raise, being subject to source, amount, and disclosure requirements, and WRTL believed it could not raise sufficient funds in its PAC to fund the grassroots lobbying campaign. *Id.* at 4-5 (Lyons Affid. ¶¶ 8-10).

[18]Full disclosure of WRTL's identity and activities as required by law would have been forthcoming. Record 30:8-9 (*AVC* ¶¶ 35-37). WRTL's ads contained the disclaimers required by 11 C.F.R. § 110.11. Record 30:9 (*AVC* ¶ 36); *see* JS App. 3a-5a (transcripts). WRTL's electioneering communication activity would have triggered a "disclosure date" of August 15, requiring it to file a report of electioneering communication activity by 11:59 p.m. on August 16. Record 30:8 (*AVC* ¶ 34).

[19]On remand, WRTL argued that the district court should reinstate and decide cross-motions for summary judgment that had been completed before the district court dismissed the case, but the court permitted extensive discovery and ordered new summary judgment briefing. WRTL argued that

Since this Court has rejected any intent-and-effect test, *Buckley*, 424 U.S. at 42, Appellants' reliance on a voluminous record purporting to attempt to prove WRTL's intent in running the ads and the ad's speculative effect on the 2004 election is misplaced. WRTL vigorously disputed many of Appellants' factual allegations below. For example, the FEC cites a swatch of its *proposed* findings of fact allegedly supporting the assertion that WRTL had "intended from the outset to air the advertisements during the BCRA pre-election period, even though the agency was generally capable of creating a radio advertisement in a week and television advertisements in two weeks." FEC Br. at 11, n.3; *see also id.* at 11, 13 (citing and quoting, respectively, Judge Roberts's dissent in the lower court criticizing the timing of the ads and the lack of ads after the 2004 election (which cites, in turn, Appellant's limited excerpts of deposition testimony)).

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any proper rule would focus on the communication's text and the relevant context (*see infra* at n.30), but the court permitted discovery on the intent-and-effect context that the FEC and Intervenors said was necessary to their theory of the case. As a result, even in this (statutorily-mandated) "expedited" case, WRTL was subjected to depositions of its executive director and its legislative and PAC director. Even the lead communications consultant at its outside advertising agency was deposed, as was a woman who did fundraising for WRTL. WRTL was required to produce a substantial volume of documents about its inner workings, plans, and finances—all information that an ideological group would otherwise keep private. Since the FEC retained two experts, WRTL attorneys needed to depose them. Since Sen. McCain et al. were permitted to intervene, WRTL has been required to respond to double briefing and extra discovery requests. The docket below shows that the FEC had 10 attorneys working on the case and the Intervenors have enjoyed the full support of the campaign finance reform lobby and counsel associated with them. *See, e.g.*, Intervenors' Br. (listing 19 attorneys). In sum, there has been a substantial investment of time and money by WRTL in this case that could have been put to advancing ideological causes by speech and petition had it not been required to vindicate constitutional rights to do so. No attorneys fees are awarded in lawsuits against the FEC, as would be the case when states violate constitutional rights.

The district court ultimately found Appellants' approach—an investigation attempting to establish the intent of the would-be speaker and the likely effect of its communication on the election—to be practically and theoretically inappropriate and so made no findings as to an external intent-and-effect context.. Even the dissent thought that key facts were not established and would require a trial to resolve. *See* JS App. at 30a, 45a, 46a, 47a-48a (references herein are to the *FEC*'s JS App.). And because WRTL objected to many alleged facts, *see* Record 88, Attachment 2; Record 89, Attachment 1, and proposed countering findings of fact, *see* Record 103, Appellants may not portray their version of the alleged intent and effect of the ads as established. In fact, WRTL did *not* intend to affect the election,[20] and defense expert Bailey expressly stated at his deposition that WRTL's Waiting Ad might not have *any* effect on the election. JA 148.

A prime example of the two views of the facts is the timing of WRTL's ads. Since this is a centerpiece of Appellants "intent" argument it will be addressed. The record evidence

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[20]Ample evidence shows that WRTL's ads were not intended to affect the 2004 election. For example, Defendants' expert Franklin agreed that the ads' target demographic, "public policy aware adults, ages 45+ with male skew," Record 81-2:44 (Franklin Exp. Rep. at 36), meant the ads were effective with people "less likely [to] change [their] mind" or "convert," but "more likely to make the call [to a senator about the issue]." JA 196-97. *See also* Record 81-2:78, 79 (Lyons Dep. at 26:6-17, 31:17, 33:5-11) (WRTL did not discuss any other purpose for or any impact on elections from the ads and had no reason to think that the ads would affect the election); Record 81-2:163-64, 166, 168, 185-86) (Vanderground Dep. at 45:25-46:2, 54:11-14, 63:14-64:2, 133:11-134:8) (ad consultant never told purpose of campaign was to affect election, never researched or considered affecting election, and never discussed with anyone or remembered "even an offhand comment anywhere" that purpose was, or "likely impact" would be, to affect election and did not believe ads impacted race); Record 81-2:196-97, 199 (Weiss Dep. at 14:10-20, 15, 23:11-25) (fundraiser told purpose was "to deal with the issue of filibustering," no candidates were mentioned, and when contacting possible donors she never mentioned any other reason for giving).

shows that WRTL ran the ads when public interest in the filibustering issue, actual and projected filibuster votes, and the ability to create and fund the ads and website coincided.[21] Barbara Lyons had advised media consultant Vanderground that she would like to get the anti-filibuster campaign started as soon as possible. Vanderground looked at how long it would take to develop TV and radio ads, along with the BeFair.com website that he recommended as most effective for contact and background information, and said that July 26, 2004, was the first date possible to launch the campaign—based on making all the preparations. Record 81-2:174.[22] As for whether it is

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[21]The snippet of testimony that the FEC cites as "indicat[ing]" that WRTL intended to air the Ads during the prohibition period so that "the advertising campaign would result in litigation" FEC Br. at 11 n.3, was from Jason Vanderground, the experienced lead consultant employed by Hanon McKendry, the advertising and brand consulting firm hired by WRTL to prepare its grassroots lobbying campaign. When read as a whole, Vanderground was recalling WRTL's Executive Director, Barbara Lyons, explaining how the electioneering communication prohibition might affect the broadcast schedule for the ads: "She felt like that she understood that Campaign Finance Reform [sic] said that there was a certain time when the ads couldn't run . . . ." Record 81-2:162-63 (Vanderground Dep.). WRTL's explanation of the law's effect was accurate and offering it to the person responsible for the planning and broadcast of the ads was unremarkable. To Vanderground's recollection, the point Barbara Lyons made was that WRTL understood that unless an injunction were granted, the ads couldn't run at a certain time because the electioneering communication prohibition would apply, not that WRTL intended to run them when they were prohibited or wanted to plan the ads' broadcast to result in a lawsuit. When counsel for the FEC asked Vanderground if Lyons "or other people from [WRTL]" indicated that she expected the ad campaign to result in a court case, he answered "she told me that she was hopeful that we would be able to continue to running the campaign." *Id.* Contrary to the FEC's characterizations, the record shows that WRTL's focus was on running the ads effectively and that it was hopeful that the broadcasts would not have to be interrupted. Vanderground did not understand Lyons or anyone at WRTL to communicate or give the impression that the ads or their broadcast were to be developed so as to lead to a court challenge to the prohibition. *Id.*

[22]The project could not be launched earlier because it was a large, inte-

important to run grassroots lobbying advertising shortly before legislative votes occur, see FEC Br. at 11; Intervenors' Br. at 27, according to WRTL's experienced consultant, timing the ads to coincide with existing public interest was as important as timing them to run "shortly before" legislative votes.[23] The

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grated campaign and there just wasn't enough time to make preparations earlier, especially during the summer months with vacations. Based on its schedule and the work Hanon McKendry had to do, the campaign could not be launched earlier. Record 81-2:174. In urgent circumstances Hanon McKendry can create and air radio ads in about a week and television ads in about two weeks, *id.* at 158, 174, but WRTL's campaign required significantly more time because of the planned quality of the spots, and the required time for strategy writing, developing creative concepts, refining ideas, planning production, and producing the ads. *Id.* at 174-75. Lyons never indicated to Vandergrund that the timing had anything to do with when the prohibition would begin or that potential litigation played any role in the timing, rather he said that the primary reason for the timing was the prominence of the filibuster issue then and WRTL's desires to address it while it was in the media and as soon as possible. *Id.* at 175.

[23]When asked by counsel for FEC whether it was generally preferable to run advertising "like the filibuster advertising" close in time to when the legislative vote is to occur, Mr. Vandergrund said "[i]t could be . . .[but] [n]ot necessarily." Record 81-2:167. He explained:

> . . . a lot of times you're timing it more around when the issue has some attention, when it's a natural time to direct people's attention to it, and so it would—if it was an issue that was being addressed in the public sector, it would make sense to have the campaign run then irregardless of whether or not there was a specific vote on a specific day or a specific week. . . . We have an issue, people are talking about that issue, and so it makes sense to address that issue right now, and just because an environmental situation may change and then may change and then may change again, that doesn't necessarily mean that you would completely change what you're doing as a campaign just because one element of that may take a different shape.

Id. at 167-68. When asked why it wasn't important in scheduling the campaign to track when the votes were going to occur, Vandergrund answered that he was "thinking much more about—the public opinion arena and . . . looked more at that it was a topic of significant conversation and less

record shows that the level of public interest in judicial filibusters coincided with WRTL's running the ads. From March 2003 to June 2004, when WRTL decided to run the anti-filibuster ads, Senate Democrats had blocked confirmation votes sixteen times, JA 223 (Franklin Expert Rep. at 7), creating strong public interest at that time. And as events unfolded, there was no reason to suppose that public interest had waned, nor, accordingly, to adjust the schedule for the ads. During July and August of 2004, the publicity surrounding judicial filibustering was at a crescendo. The Republican leadership held four votes on stalled nominations between July 20 and 22, ending with the twentieth failed attempt. *Id.* On July 21, 2004, the U.S. Senate voted 53 to 44 in favor of a motion to invoke cloture, but the motion failed to garner the required three-fifths vote to invoke cloture. 150 Cong. Rec. S8459-60; Record 30 (*AVC* ¶ 8). The Senate Judiciary Chairman publicly predicted that judicial filibusters would mount before fall adjournment. Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1. Record 30 (*AVC* ¶ 9). Thus, there was no reason to adjust the schedule for the ads, and the fact that WRTL did not do so suggests, if anything, only that WRTL took the advice of its advertising agency.[24]

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on the specific dates in the actual Senate schedule." *Id.* at 167. And while Sue Armacost, WRTL's on-staff legislative lobbyist, agreed in her deposition with the unremarkable proposition that grassroots efforts should occur "fairly close in time to when the votes actually would occur" as opposed to after those votes, Record 81-2:145, this does not conflict with the view that the timing of the ads should be steered mainly by public interest, as advised by Vanderground. Such interest did, in fact, drive the timing of the ads.

[24]Contrary to predictions, the anticipated "fall showdown" did not materialize and no more judicial filibuster votes occurred in 2004, FEC Br. at 11, although WRTL had no way of predicting that when it decided to prepare and run its ads. Senate Republican leaders decided in November 2004 not to press the predicted confrontation at that time. *See* Paul Kane, *GOP Cools to Judicial Gambit*, Roll Call, Sep. 13, 2004. Majority reelection of President George W. Bush and Republican increases in both houses of

In the spring of 2005, the filibuster issue was different than it had been in 2004. So there was no reason for WRTL to run ads then. The spring-2005 debate was whether the Senate leadership could garner enough Republican votes to change Senate rules to preclude judicial nominee filibusters, not whether judicial filibusters were good or bad per se or whether the Wisconsin Senators should be supporting them. Record 76, Attachment 1 at 12 (2d Lyons Affid. ¶ 9). The central question was whether Senate Majority Leader Frist could get fifty Republican senators to support the rule change because it was certain that no Democrat senators would support it. Since Wisconsin had no Republican senators, there was no senator to lobby in Wisconsin. *Id.* Defense expert Charles H. Franklin, III agreed that what "came to a head" then was the debate over the use of the so-called "nuclear option":

> The Republican leadership had signaled clearly that it was ready to bring an end to the democratic filibuster through the so-called nuclear option, to change the rules to require only 51 votes to end debate on judicial nominations. . . . [I]n the March to May time frame, it was clear that it was going to be scheduled. . . . [I]t was clear that it was coming to a head . . . .

JA 205-06 (Franklin Dep. 27:10-20).[25] Finally, the record shows

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Congress in the November 2004 election minimized the Democrat argument for filibusters somewhat, *see 'Nuclear' Truce*, Roll Call, Nov. 17, 2004, and the filibuster problem was at least temporarily put to rest by an agreement among a bipartisan coalition of Senators. *See* Paul Kane & Mark Preston, *Fourteen Senators Sign Off on Compromise*, Roll Call, May 23, 2005. As counsel for WRTL explained in oral argument before this Court in *WRTL I*, "the filibuster issue, as it related to that session of Congress, it was thought that it was going to come to a head in—in October . . . but it did not." Transcript of Oral Arg. at 9, *WRTL I*, 546 U.S. 410 (No. 04-1581). It was fully appropriate to run WRTL's ads while the Senators were in their home state for recess because they were then more readily accessible to the people back home who would want to lobby them in person on the issue.

[25]Running anti-filibuster ads in the spring of 2005 was also inadvisable

that when sufficient public interest was sustained long enough to allow preparation time, and its available resources allowed, WRTL has run anti-filibustering ads.[26]

This extended discussion of the temporal context of WRTL's ads demonstrates that Appellants' assertions of "fact" and repeated mantra of "undisputed facts" must be viewed with extreme caution because (1) much of what they allege as to facts indicating WRTL's intent is in fact disputed and (2) the undisputed, statutorily and constitutionally cognizable facts are quite limited. *See infra* at n.30 (relevant context) and *infra* at Part IV.C, n.68, n.70.(scope of statutory and constitutional

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because as communication consultant Jason Vanderground testified, it was doubtful whether public interest in the judicial filibuster issue had reached a suitable level then to make an ad campaign viable. Record 81-2:189. Even when instructed by counsel for the FEC to assume that at that time, "the country was paying . . . a lot of attention to the issue," *id.*, Vanderground was still unable to agree that it "would . . . have made sense" to "resurrect" WRTL's campaign. *Id.* When FEC counsel suggested that the attention the issue garnered in the spring of 2005 should have matched that of August of 2004, Vanderground did not agree that it had necessarily reached a comparable crescendo: "My . . . recollection of the situation that you're describing was that it became an issue, very quickly it heated up, and then there was an agreement, and then it really—it became an issue with much less focus, and that the whole scenario happened relatively quickly." *Id.* at 189. It was Vanderground's opinion that public interest in the issue in the spring of 2005 reached a suitable level only for a very short time, making it a poor candidate for an ad campaign that could take considerable time and expense to mount. *Id.* As counsel for WRTL explained in the January, 2006 oral argument in *WRTL I*, "each organization has to make an assessment with respect to the different issues that they want to be lobbying on and the—their pressing nature." Transcript of Oral Arg. at 9, WRTL I, 546 U.S. 410 (No. 04-1581).

[26]WRTL ran an anti-filibuster grassroots lobbying ad in January, 2006, when a filibuster of Supreme Court nominee Samuel Alito was threatened. It is the opinion of WRTL and of Barbara Lyons, based on her many years of experience in legislative matters, that the ad affected Senator Kohl's subsequent vote in favor of cloture. Record 76, Attachment 1 at 11 (2d Lyons Affid. ¶ 7).

cognizability).

WRTL has acknowledged from the beginning that, in communications other than its grassroots lobbying ads, both it and WRTL-PAC have made prior statements opposing Sen. Feingold, both as to his position on the filibusters and as a candidate, but as noted below, these separate statements by WRTL and by the legally distinct WRTL-PAC, *Cal. Med. Assoc'n v. FEC*, 453 U.S. 182, 196 (1981) (PAC is "is a separate legal entity that receives funds from multiple sources and that engages in independent political advocacy."), are neither statutorily nor constitutionally cognizable in evaluating whether the ads at issue are "genuine issue ads." *See infra* at Part IV.C, n.68, n.70. WRTL has acknowledged from the beginning that it accepts some corporate funds. Some corporate funds were donated for the anti-filibuster campaign. However, this does not give rise to any corporate-fund conduit interest because corporations can do petitioning by genuine issue ads. *Bellotti*, 435 U.S. at 774.

As with the extended discussion of the timing of WRTL's ads, a discussion of the opinions of the defense experts is pertinent because it is a centerpiece of Appellants' argument as to "effect" of the ads on the election. Both of the FEC's expert witnesses recognize grassroots lobbying as discernible from electioneering.[27] While conceding the legitimacy of grassroots

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[27]Franklin considers grassroots lobbying as "for the most part" a subcategory of issue advocacy. JA 177. Franklin agrees that organizations that want to influence government policy often engage in grassroots lobbying, JA 180, and do so as a means to influence current office holders and how they vote in Congress. Record 81-2:215 (Franklin Dep. 43:3). Franklin agrees that communications that have three elements – they relate to specific legislation, reflect a point of view on the legislation's merits, and encourage the general public to contact legislators – "appear within grassroots lobbying," JA 178, 206, and offers that a definition should include "efforts to mobilize supporters" and "efforts to persuade the public" on a specific issue as grassroots lobbying as well. Record 81-2:214 (Franklin Dep. at 37:9-11). According to Franklin, a significant number of the ads in the spring of 2005 for and against judicial filibusters were designed to affect

lobbying advertisements, these experts drew broad conclusions about the admittedly unintended effects of such ads. *See* Record 81:38 (*FEC Mem. Supp. S.J.* at 30) (Experts "provided unrebutted testimony that, regardless of WRTL's effort to avoid overt electioneering in the actual ad text, WRTL's ads would likely have influenced the election if broadcast during the 2004 electioneering communication periods.").

But the district court found no practical or legal basis for accepting the "highly questionable assumption" that the "speculative conjecture" of such experts "can actually project the 'likely' impact of a given ad on the electoral process." JS App. 19a-20a. Among the experts' conjectures were that WRTL's grassroots lobbying would have had an electoral effect because of circumstances external to the ads or WRTL's plans, that any communication (regardless of mode or whether it even mentions a candidate) can have an electoral effect, and that the less a communication resembles express advocacy, the more effective it is as an electioneering communication.

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or influence the vote in the Senate on the filibuster issue, while some may have been more aimed at public opinion generally. Those ads that were directed or aimed at influencing the vote in the Senate mentioned a specific senator by name, pointed to his or her role in the debate, and were broadcasted primarily in the states where those senators were from. JA 174.

Douglas L. Bailey admits that groups can do grassroots lobbying, which he calls "public lobbying advertising," JA 139, when the position of an officeholder is undecided, JA 148, that it is customarily done when a bill or issue is before Congress, *id.* 142, that "increasingly" such ads mention the names of officeholders to be lobbied, generally in order to enable the public "to weigh in with" an undecided officeholder or to sway her position, *id.*; that they are targeted to districts or states, *id.*; and that WRTL's 2004 ads were public lobbying advertising. JA 151 (exhibits 5, 6 and 7 were scripts of the three 2004 ads). Bailey also acknowledged that the PBA ad was public policy advertising, JA 150-51 (Exhibit GIA 6 was the PBA Ad), and that the 2006 Filibuster Radio Ad concerning the Alito nomination filibuster was public policy advertising. JA 156 (Exhibit 9 was the 2006 Filibuster Radio Ad). Bailey acknowledged that public lobbying advertising "can be" successful in persuading a public official to change his position, adding that "[g]enerally, frankly, it's not, but it can be." JA 152.

Franklin could not determine that any given ad was intended to or would in fact affect an election.[28] He believes that the effect of grassroots lobbying on an election depends in large part on characteristics of the voters' attentiveness to politics and their predispositions, partisan or ideological. JA 191, and that if an ad is not countered by an opposing view, it is more likely that its message "will have a net effect on public opinion or vote choice." JA 207. In Franklin's opinion, the press releases of state Senator Bob Welch and comments of two other candidates and the Wisconsin State Republican Chairman, as reported in a news articles, made the subject of judicial nominations a "partisan issue." JA 226-27. He believes that the net effect of grassroots lobbying depends on the "baseline" or "salience" established by earlier communications. JA 175. He testified that if "issues are linked to the considerations" that voters have on their mind when going to vote, "then that topic or issue is likely to have a greater impact on their voting choice than if it is not salient to them at the moment." Record 81-2:223 (Franklin Dep. at 78:10-17). So under his view, regardless of a communication's content or medium, or whether it mentions a candidate, a speaker must ascertain the opposition to his

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[28]According to Franklin, the effect of grassroots lobbying "would depend in part on the setting and the nature of the effort," JA 206, and "one can imagine the same elements being literally present in one context and having a very different impact or effect or purpose than having the same elements in another." *Id.* A fair summary of his report is that "the discussion of public policy issues can affect an election." JA 185. He offered that any communication to the public through any means can affect an election: telemarketing, phone calls, newspaper advertising, direct mail, web site information, radio and television advertising, even radio talk shows or news broadcasts, even when not mentioning a candidate or officeholder, can have an electoral impact, JA 186-87, but "[w]ithout empirical research, it's difficult to say how much [effect] any one of [these communications] would [have]."). JA 187. Franklin offered that a communication has an electoral effect or "electorally relevant impact" whenever it "deals with politically relevant issues," JA 187, and that a sincere intent to affect a policy position can still have an "overt . . . electioneering consequence." JA 210.

message and ascertain the voters' predispositions and how salient the issue he wishes to address has become to them in order to gauge whether his communication is electorally effective and therefore regulable.

In the opinion of Bailey, the other defense witness, an issue ad is "something that is hopefully going to have an impact on issues," JA 133. He believes that campaign ads include ads that do not mention the names of candidates, JA 134, and "an issue ad run in a campaign is a campaign ad," JA 133, because "[a]nything that happens in the course of a campaign . . . potentially has some impact on the campaign so that any ad run that relates to candidates or the issues in a campaign is going to have some impact on the campaign." JA 134. *See also* JA 132, 133 (campaign ad and issue ad can be the same thing), 157 ("ads that raise issues in relation to candidates . . . are putting in the minds of the voters, candidates and issues which potentially has an impact on elections, so it becomes a campaign ad."). He said that the "timing, . . . content and . . . obvious intent" of WRTL's Waiting Ad "obviously" made it a campaign ad, JA 148-49, despite agreeing that it (a) referenced a specific current legislative matter, JA 154, (b) only "implied" the Senators' position on the issue, and (c) was consistent with the possibility that one or both Senators were undecided, JA 148, (d) did not identify the Senators as candidates, JA 155, (e) contained no reference to Sen. Feingold's character, qualifications or fitness for office, JA 155, and (f) contained no words that promoted, supported, attacked or opposed him. JA 156.

In Bailey's view, six ads found to be genuine issue advocacy in the *McConnell* litigation,[29] which included the PBA Ad,

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[29]The six ads, herein referred to as the "genuine issue ads" or "GIA" ads, were identified in the report of *McConnell* Intervenor Defendants' expert, Kenneth M. Goldstein, as "Genuine Issue Ads" (defined by Goldstein as "ads coded as providing information or urging action"as opposed to "Electioneering Ads," defined as "generating support or opposition for a particular candidate"), Amended Expert Report of Kenneth M. Goldstein on Behalf of Intervenor Defendants at 7. The six ads were considered genuine

were "all campaign ads" and would "inevitably . . . have some impact, maybe a little, maybe a lot, on an election . . . ." JA 145;159-67. He found that WRTL's ads "are probably more effective campaign ads" than the *McConnell* genuine issue ads because WRTL's ads "are not so obvious" and "are a little more subtle." JA 146.

Bailey was then presented with the sham Yellowtail Ad, Record 76:6, taken from *McConnell*, 540 U.S. at 193, n.78. JA 152. He concluded that, compared to the Yellowtail Ad, WRTL's Waiting Ad is "subtle[,] [i]mplies the position of the candidates . . . and is, therefore, more likely to be an effective . . . campaign communication." JA 154. The fact that the Waiting Ad referenced a specific legislative matter and urged contact with the referenced candidate to take a particular position on the matter while the Yellowtail Ad did not refer to any legislative matter and contained references to the character and integrity of the candidate led Mr. Bailey to opine that "I think that [the Waiting Ad] is a more effective campaign ad." JA 154. On a moment's reflection, these statements yield the remarkable proposition that, according to Bailey, the less an ad is like express advocacy, the more it is the functional equivalent of express advocacy and regulable. This stands *McConnell*'s narrow-tailoring functional equivalence test on its head.

The district court held the prohibition unconstitutional as applied to the three WRTL ads. JS App. 29a. While the court listed five factual topics that it would "at a minimum" examine "within the four corners of" an ad, JS App. 22a, those five topics were not in any way a general test. While the focus was on the four corners, there was a *relevant context* that was before the court.[30] Instead, the court found that: "the common denomi-

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issue ads by Goldstein's coders and he decided they were genuine issue ads. *McConnell*, 251 F. Supp. at 747-48 (opinion of Judge Kollar-Kotelly).

[30]The ***relevant context*** consists of the elements of the "electioneering communication" definition and prohibition, i.e., whether (a) the public official named is a candidate, (b) the communicator is a corporation (or union),

nator between express advocacy and its functional equivalent, as the Supreme Court defined it in *McConnell*, is the *link* between the words and images used in the ad and the fitness, or lack thereof, of the candidate for public office." JS App. 27a (emphasis added). "[T]he absence of that link . . . enables an issue ad to be fairly regarded as a genuine issue ad." *Id.* The district court's test focused on identifying genuine issue ads, of which grassroots lobbying is a subcategory with the additional constitutional protection of the right to petition.

During the prohibition period before the fall 2006 Wisconsin elections, WRTL sought another preliminary injunction to broadcast another grassroots lobbying ad. The "CCPA Ad" asked Wisconsin citizens to call Senators Kohl and Feingold about helping to finalize enactment of the Child Custody Protection Act (which had passed by wide margins in both houses but was then stalled by parliamentary maneuvering before finalization). That time Sen. Kohl was a candidate. This ad clearly stated the record of the candidates on the issue as follows: "Fortunately, Senator Kohl voted for the rights of parents. But, sadly, Senator Feingold did not." *See* Bopp & Coleson, *Distinguishing* at 404 ("CCPA Ad" in Appendix) (emphasis in original). A preliminary injunction was denied and the district court declined to consider the ad along with the three anti-filibuster ads that it considered in the opinion now before this Court. Given the denial of WRTL's request to consider the ads together, WRTL filed another summary judgment motion as to the CCPA Ad, but the defendants have insisted to the court that they must have another round of intent-and-effect discovery of WRTL before they can proceed to respond. Record

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(c) the ad is broadcast, (d) the ad is targeted, and (e) the ad is broadcast within a prohibition period. In addition, as to grassroots lobbying there is the question of whether the communication concerns a current legislative or executive branch matter. The district court treated these relevant context facts as given, on the facts of this case, and so did not discuss them. By its "four corners" statement it indicated its rejection (on both practical and constitutional grounds) of any intent-and-effect context.

132:5. The court has not ruled on their motion.

SUMMARY OF THE ARGUMENT

While WRTL has forever lost the opportunity to broadcast its 2004 grassroots lobbying ads, it seeks recognition of constitutional protection for its ads so that the next opportunity will not be lost as well. This case is well within the exception to mootness because there is a reasonable likelihood that WRTL will again want to broadcast grassroots lobbying ads that qualify as electioneering communications. The experiences of this case and *CCLM* (06-589) demonstrate that such cases will evade review. The short-notice nature of grassroots lobbying makes it certain.

Appellants and their amici seek to shift the burden to WRTL to justify its ads. But the strict scrutiny burden is on the government because paying for grassroots lobbying from a PAC, or communicating with less effective means at less effective times, is a heavy burden on the right of the sovereign people to participate in self-government through their liberties of expression, association, and petition. Precedent specifically requires strict-scrutiny justification in such circumstances. *McConnell* employed strict scrutiny by (1) stating that the corporate-form interest is compelling as to restricting corporate express advocacy and (2) doing narrow tailoring by stating that sham ads were "the functional equivalent of express advocacy." But *McConnell* recognized that this analysis "might not apply to the regulation of genuine issue ads."

Strict scrutiny requires that the prohibition is narrowly tailored, in the least restrictive manner, to a compelling interest. However, WRTL's grass roots lobbying ads are not the "functional equivalent of express advocacy," because they are materially identical to the PBA ad, identified in *McConnell* as a genuine issue ad. Furthermore, grass roots lobbying has only a remote and speculative effect on elections and corporations have an independent First Amendment right to engage in such communications.

Furthermore, there are two less restrictive means that Congress could have employed, so that the prohibition fails strict scrutiny. One would be to require that electioneering communications be funded from a separate bank account (with no corporate funds) instead of from a PAC. WRTL offered to funds its ads from such an account, which would have eliminated the corporate-form interest. A second less restrictive means would be a test distinguishing grassroots lobbying that is not functionally equivalent to express advocacy.

Alternatively, the facial upholding of the prohibition in *McConnell* should be overturned because (1) the FEC and Intervenors contend that WRTL's genuine issue ads are in the "heartland" or "core" of what Congress intended to eliminate with the prohibition and (2) the experiences of this case and *CCLM* (No. 06-589) have demonstrated that as-applied challenges are an inadequate remedy to protect genuine issue ads

ARGUMENT

I. This Case Is Within the Mootness Exception.

The FEC claims that the 2004 ads are moot and not "'capable of repetition, yet evading review.'" *See* FEC Br. at 21 (citation omitted).[31] WRTL set the answer to this assertion before the Court in *WRTL I*, so that the issue was before this Court when it considered the case in January 2006. *See* Jur. Stmt. at 7 & nn.2 & 3; Br. of Appellant at 9 n.8, *WRTL I*, 546 U.S. 410 (No. 04-1581). Since "the case or controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate," FEC Br. at 21, this issue was before this Court in January 2006, long after the facts that the

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[31] In the district court, both Appellants claimed that this controversy was neither capable of repetition nor would evade review. JS App. 11a-12a. In April 2006, when asked to address mootness, the FEC characterized the issue as "a close question," Record 73:3 (*FEC Resp. Court's Apr. 17 2006 Order* at 3), while the Intervenors insisted that the controversy failed both prongs. Now the Intervenors concede justiciability, Intervenors' Br. at 13 n.7, and the FEC asserts mootness. FEC Br. at 24.

FEC now claims prove this controversy moot. *See* FEC Br. at 23-24. After remand, with the benefit of full briefing on the question, the district court ruled that WRTL's "predicament" was "a classic example of [this] well-established exception to the mootness doctrine." JS App. 12a.

As to "evading review," the relevant period has *proved* to be a "wholly unrealistic" window in which to reach final resolution of an as-applied challenge to the electioneering communication prohibition. JS App. 13a. This negates Appellants' contention that "[t]here is no reason to assume" that the controversy's recurrence will not evade review. FEC Br. at 24 n.6. Nor is presuming that a suit could be brought "well in advance" of the prohibition period warranted. *Id.* In fact, the controversy will likely *only* arise when it cannot be fully reviewed. As the district court pointed out, "legislation typically arises in the 30- and 60-day periods before a federal primary or general election." JS App. 15a (*citing McConnell*, 251 F. Supp. 2d at 793 (Leon, J.)). As-applied challenges[32] to the prohibition will therefore be brought on an emergency basis during the closing days of a campaign. *Id.* at 18a,19a. This case was filed before the electioneering communication prohibition period in 2004. Despite statutorily-required expedition "to the greatest extent possible," BCRA § 403(a)(4),[33] "[WRTL's] claims have

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[32]"The 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks." *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974). It is "appropriate" because "[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." *Id.*

[33]As of January, 2007, challenges to BCRA's provisions can be brought in district courts other than the District of Columbia's, and the expedition requirement applies only to those actions plaintiffs elect to bring in the District of Columbia. BCRA § 403(a) & (d), 116 Stat. 113-114. Accordingly, for those cases brought outside the District, the statutory expedition,

yet to be 'fully litigated.'" *Id.* at 13a. The two-year election cycle has "proved too short a period of time for appell[ee] to obtain complete judicial review, and there is every reason to believe that any future suit would take at least as long." *Bellotti*, 435 U.S. at 774. So "it is entirely unreasonable, if not fanciful, to expect that a plaintiff could have obtained complete judicial review of its claims in time for it to air its ads during the 30 and 60-day . . . [prohibition period]," JS App. 13a, and "a decision allowing the desired expenditures would be an empty gesture unless it afforded appellants sufficient opportunity prior to the election date to communicate their views effectively." *Bellotti*, 435 U.S. at 774.[34]

As to "capable of repetition," this case readily fits within the exception to mootness because there is a "'reasonable expectation' . . . that the same *controversy* will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (emphasis added) (*quoting Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). The FEC misstates what "similar factual circumstances," *Bellotti*, 435 U.S. at 774, must be shown to be reasonably expected to recur, and ignores record evidence establishing that the relevant

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as insufficient as it has proved here, is not even required.

[34]To suggest, as the FEC does, that plaintiffs could obtain full review by forgoing a preenforcement challenge and instead subject themselves to enforcement actions and risk criminal prosecution, FEC Br. 24 n.6, flies in the face of the preenforcement doctrine. This Court has held repeatedly "[w]hen contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (*quoting Steffel v. Thompson*, 415 U.S. 459, 459 (1974)). "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Id.* at 298 (*quoting Doe v. Bolton*, 410 U.S. 179, 188 (1973)).

factual circumstances will likely recur. The same controversy will arise when WRTL will again be subject to the "electioneering communication" prohibition when it needs to engage in grassroots lobbying, because then it "*will again be subjected to the alleged illegality.*" *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (emphasis added). *See also Bellotti*, 435 U.S. at 774-75 (holding the capable of repetition prong satisfied where there was "no serious doubt that there is a 'reasonable expectation' that appellants again *will be subject to the threat of prosecution*" under the challenged law (emphasis added) (*quoting Weinstein*, 423 U.S. at 149)). The controversy will recur when the alleged illegality—an unconstitutional application of the prohibition and the coinciding threat of prosecution—recurs. The alleged illegal action will recur when WRTL wishes to run a targeted broadcast ad mentioning a candidate within the prohibition period, regardless of whether such an ad shares "the five characteristics that the district court found dispositive in sustaining [WRTL's] as-applied challenge." FEC Br. at 24. As in *Bellotti*, it is uncontroverted that the situation giving rise to the need to violate the prohibition will regularly recur. 435 U.S. at 774-76.[35] Legislative issues will typically arise in the prohibition period. JS App. 15a. WRTL intends to run materially similar grass-roots lobbying ads during those periods as necessary, and WRTL is concerned about a range of issues that

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[35]As was the case in *Bellotti*, "there is no reason to believe that the [enforcing agency] will refrain from prosecuting violations of [the prohibition]." 435 U.S. at 775. The prohibition is plainly applicable to the 2004 Ads and any "targeted" broadcast ad aired during the prohibition periods. There are no regulatory exceptions to the electioneering communication prohibition for grassroots lobbying, and WRTL "is subject to litigation challenging the legality of [its] actions if contrary to the Commission's rule" by a private party and without an FEC enforcement decision." *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (noting that 2 U.S.C. § 437g(a)(8) so provides). "Meanwhile, [the prohibition] remains on the books as a complete prohibition of corporate expenditures" for grassroots lobbying during the prohibition period, and "the effect of the statute on arguably protected speech will persist." *Bellotti*, 435 U.S. at 775.

regularly have and will become issues in the legislative and executive branch. Record 30 (*AVC* ¶ 16)[36] The relevant facts are capable of repetition and, therefore, the exception applies.[37]

II. Strict Scrutiny Applies.

Appellants and their amici attempt to shift their strict scrutiny burden to WRTL.[38] But this case involves a *prohibition*[39] that substantially burdens the people's rights to self-government using their liberties of expression, association, and petition. A politician who chooses to run for reelection wears two hats, the hat of office as the people's representative and servant and the campaign hat. Government continues to function during elections, and where a law burdens the people's right to participate in that government by petitioning the

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[36]Availability of PAC funds does not control the capable of repetition prong because WRTL challenges the very necessity of using them.

[37]The district court's reliance on "election-related challenges in which [the capable of repetition, yet evading review] exception was applied," JS App. 12a, is not misplaced. Controversies over "*electoral processes*," FEC Br. at 24, recur because electoral processes are part of *elections*, and elections recur. The transferable concept is that a process or activity inherently surrounding an election will recur. The controversy here will recur because elections, without which there is no prohibition period, will recur. In other words, if the controversy recurs at all, it will be in proximity to an election, and elections undeniably recur.

[38]*See, e.g.*, FEC Br. at 19, 28, 32-35; Intervenors' Br. at 30 (WRTL must prove PAC-option inadequate), 39 (WRTL must show "no reasonable prospect the ad is likely to influence the election," i.e., "differen[ce] in *kind*" (emphasis in original); Brifault & Hasen A.C. Br. at 24 (WRTL must "prove[] that the communication is unlikely to have any appreciable effect on voter's choices"); Dorsen et al. A.C. Br. at 13 (four elements of electioneering definition "satisf[y] government's burden [as to] purpose and perceived effect" so burden shifted to WRTL).

[39]WRTL did not challenge the electioneering communication *disclosure* requirements. *See supra* at n.18. But Appellants' amici curiae League of Women Voters et al. erroneously believe that this case is about *disclosure*. LWV et al. A.C. Br. at 14 ("all without disclosure"), 18 (same).

incumbent, the government bears the strict-scrutiny burden.

A. *Self-Government Right.* The prohibition burdens the self-government rights of the people. The people are sovereign. U.S. Const. preamble; *Buckley*, 424 U.S. at 14 ("In a republic . . . the people are sovereign . . . ."). In a constitutional republic, government is restricted to the powers expressly granted by the people. U.S. Const. amend. X. The people created legislators to represent them, U.S. Const. art. I, § 1; art. IV, § 4, and amended the Constitution to elect Senators directly. U.S. Const. amend. XVII. They mandated Congress not to restrict the peoples' rights to speak, associate,[40] and petition in exercising their sovereign rights. U.S. Const. amend. I.

B. *Expression Right.* The First Amendment is designed "'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 14 (*quoting Roth v. United States*, 354 U.S. 476, 484 (1957)). "'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *Bellotti*, 435 U.S. at 777 n.12 (citation omitted). "It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 777.

C. *Expressive Association Right.* While the individuals who make up WRTL could engage in electioneering communication, 2 U.S.C. § 434(f) (requiring only disclosure if spending exceeds $10,000 in a calendar year), when they form themselves into an effective advocacy group for lobbying, their lobbying through broadcast ads is prohibited for some 90 days during an election year.[41] Citizen groups formed under the right

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[40] "[T]he First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas . . . ." *Buckley*, 424 U.S. at 16 (citations and quotation indicators omitted).

[41] The true temporal and geographic effect of the prohibition is broader than may first appear. *See* Bradley A. Smith & Jason Robert Owen, *Bound-*

of association are an essential component of democracy in action. In *Buckley*, this Court reaffirmed the constitutional protection for association: "[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. [Consequently,] the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas." *Buckley*, 424 U.S. at 15."[A]ction which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 25.[42] This highest level of constitutional protection flows from the essential function of associations in allowing effective participation in our democratic republic by amplifying individual speech. *Id.* at 22.

D. *Petition Right.* Grassroots lobbying is also protected by a right not considered in *McConnell*, i.e., the right to petition. The right to petition is "one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (*quoting United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967)). Grassroots lobbying is a quintessential exercise of the right to petition. *Eastern R.R. President Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961); *Liberty Lobby, Inc. v. Pearson*, 390 F. 2d 489, 491 (D.C. Cir. 1968). The right

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ary Based Restrictions in Unbounded Broadcast Media Markets: McConnell v. FEC's Underinclusive Overbreadth Analysis, 20 Stan. L. & Pol'y Rev. 101 (2007).

[42]When only an associational interest is involved, as with limits on cash contributions to candidates, the government need only demonstrate that the "contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'" *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000). But when speech is limited, as here, the statute is subject to strict scrutiny, requiring the government to demonstrate that the regulation is narrowly tailored to advance a compelling governmental interest, *Buckley*, 424 U.S. at 64-65, the standard employed for expressive association. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Boy Scouts of America v. Dale*, 530 U.S. 640, 657-59 (2001).

of corporations to petition both the legislative and executive branches was recognized in *Noerr*, 365 U.S. at 135. This Court held that attempts to influence the passage or enforcement of laws were constitutionally protected, essential to representative government, and could not be a violation of the Sherman Act:

> In a representative democracy such as this, these [legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. . . . The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 137-38. *See also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("the right to petition extends to all departments of the government"). In *Bellotti*, 435 U.S. 765, this Court applied the right of petition to corporations which sought "to publicize their views on a proposed constitutional amendment . . . to be submitted . . . as a ballot question," *id.* at 769, holding that it was constitutionally protected. *Id.* at 776-78, 790-96. *Bellotti* noted that "the First Amendment protects the right of corporations to petition legislative and administrative bodies," and concluded that "there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity." *Id.* at 791 n.31. And as general advocacy of public issues, grassroots lobbying is protected under the First Amendment as part of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times*, 376 U.S. at 270.

The government bears the burden of justifying statutes that target speech based on its content—especially speech at the core of our constitutional system of government—under the strict-scrutiny test. *See, e.g., Buckley*, 424 U.S. at 39, 44-45 ("exact-

ing scrutiny"); *FEC v. National Conservative PAC*, 470 U.S. 480, 496 (1985). "Under the strict-scrutiny test, [the government has] the burden to prove that the [challenged provision] is (1) narrowly tailored, to serve (2) a compelling state interest. *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002) (*quoting Brown v. Hartlage*, 456 U.S. 45, 54 (1982), and *citing Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222 (1989)). "In order to show that a given statute is narrowly tailored, the State must demonstrate that it does not "unnecessarily circumscrib[e] protected expression," *id.*, so that it is the least restrictive means to further a compelling interest. *See*, *MCFL*, 470 U.S. at 262 ("interest . . . can be met in a manner less restrictive").

E. ***PAC Mandates Trigger Strict Scrutiny.*** Specifically, where the government imposes a PAC mandate, as does the electioneering communication prohibition, the government bears the strict scrutiny burden of justifying this infringement on the peoples' liberty. The PAC-option is a serious burden and is inadequate, constitutionally and factually, as a means for communications that do not contain express advocacy or its functional equivalent.[43] In fact, where a corporation must use

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[43] *McConnell* held that the PAC-option "provide[s] corporations and unions with a constitutionally sufficient opportunity to engage in *express advocacy*," 540 U.S. at 203 (emphasis added), but *McConnell* never held that "genuine issue advocacy" is express advocacy, indicating rather by its substantial overbreadth analysis that the prohibition was facially constitutional because it did not sweep in a "substantial" number of "genuine issue ads." *Id.* at 205-07. In *MCFL* , this Court said that the PAC-option was not adequate with respect to independent expenditures (containing express advocacy) for *MCFL*-type corporations and catalogued some of the burdens inherent in PAC funding. *MCFL*, 479 U.S. at 252-55. Justice O'Connor concurred, highlighting especially the PAC-option burdens on MCFL. *Id.* at 265 (O'Connor, J., concurring). In *MCFL*, the FEC clearly had the strict-scrutiny burden and advanced three interests that the Court rejected as not compelling or which could be met with less-restrictive, more narrowly-tailored means. *Id.* at 256 (corporate-form interest), 260 (protecting donors), and ("massive undisclosed spending" and "conduits" necessitating a "bright-

PAC funds for grassroots lobbying there is a tax on the expenditure.[44] And on the facts of this case, the PAC alternative was inadequate. WRTL had only a limited time to engage in grassroots lobbying in favor of an up-or-down vote on judicial nominees. A lost opportunity at the critical time is an opportunity lost forever. These were highly important matters to WRTL and its members, not "mere" theoretical deprivations of First Amendment rights to speak on matters of public concern. When a legislative issue arises on short notice, as here, there is no time for corporations without a PAC to organize one, go through the time-consuming, cumbersome process of first acquiring FECA-compliant "members" (who must fit certain criteria to qualify for solicitation and may not be solicited for PAC money until they respond to a prior solicitation to become members of the organization and the organization responds indicating acceptance)[45] and then raise PAC money from the

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line rule").

[44]The expenditure for a grassroots lobbying electioneering communication done by a PAC is subject to tax (at the highest rate). *See* IRS Rev. Rul 2004-6, 26 U.S.C. § 527. If the PAC does enough lobbying that lobbying becomes its major purpose, the PAC loses its tax exempt status and its connected corporation must pay a tax on all of the PACs expenditures (at the highest rate). Moreover, communications attributed to a PAC may not be distributed in churches, as doing so would affect their nonprofit status under federal law. 26 C.F.R. § 1.501(c)(3)-1(a)(i), 26 C.F.R. § 1.501(c)(3)-1(a)(ii)).

[45]A "membership corporation," 11 C.F.R. § 114.1(e)(1), such as WRTL, may not solicit contributions to its PAC from non-members (unless they are "executive or administrative personnel, and their families"). 11 C.F.R. § 114.7(a). To acquire "members," a membership corporation must comply with 11 C.F.R. § 114.1(e)(1), i.e., have a prescribed organizational structure, have prescribed language in its organic documents, "expressly solicit[] persons to become members," and "expressly acknowledge[] the acceptance of membership," and comply with § 114.1(e)(2), i.e., the member must have "some significant financial attachment to the membership organization" (described), or "pay membership dues at least annually," or "have a significant organizational attachment to the membership organization" (described). While a membership corporation may solicit members as

members through the multiple appeals required for fundraising. Record 76, Attachment 1:5 (Lyons Affid. ¶ 9). Nonprofit corporations organized under IRC § 501(c)(3) are not permitted to have a PAC. Where a corporation has a PAC, the PAC alternative is untenable where there is inadequate time to raise sufficient funds by appeals to existing members through the multi-step process of recruiting new members and then soliciting statutorily-limited contributions. *See supra* at n.46. The PAC requirement in such situations is a complete ban. But the presence or absence of PAC funds does not alter the fact that requiring the PAC-option mandates strict scrutiny, as this Court decided in *Austin*, noting that the Michigan Chamber of Commerce had raised substantial PAC funds but still mandating strict scrutiny. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658 (1990).

F. *McConnell Employed Strict Scrutiny.* Where a First Amendment facial overbreadth challenge is brought, this Court still requires a compelling interest and narrow tailoring. *McConnell* employed the strict-scrutiny analysis by first setting out the only compelling interest that justifies a *prohibition*, i.e., the corporate-form interest (only corporations are prohibited from paying for electioneering communications, as are unions for parity). *See* 540 U.S. at 205. The narrow tailoring analysis was done by analogy, which began by framing the corporate-form interest as an interest in regulating express advocacy, *id.* then stated the issue as whether "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications." *Id.* at 206. The Court held that this "argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *Id.* Only at this point did the Court begin the

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desired, other corporations may only solicit their employees for a PAC contribution twice a year. 11 C.F.R. § 114.6.

overbreadth analysis, holding that plaintiffs failed to prove that the prohibition reached a substantial number of "genuine issue ads" as compared to the sham ads that were the "functional equivalent of express advocacy." *Id.* at 206-207. *McConnell* decided only a facial challenge to the prohibition so that no as-applied issues could have been resolved, and the Court held in *WRTL I*, 546 U.S. 410 (2006), that neither the language nor the logic of *McConnell* precluded a challenge to the prohibition as applied to grassroots lobbying. *McConnell* did not recognize that the government had met its strict-scrutiny burden as applied to the "genuine issue ads" that *McConnell* recognized. *See* 540 U.S. at 206 & n.88.

G. *McConnell Did Not Create an Intent-and-Effect Test.* The centerpiece of Appellants' argument is that *McConnell* approved an intent-and-effect test warranting a broad contextual investigation into the speaker's alleged true purpose. FEC Br. at 43; Intervenors' Br. at 21.[46] Their approach treats the actual text of the communication as essentially irrelevant. It is an empty vessel into which they pour discovered intent from an external context that is often beyond the speaker's control or even knowledge.[47] As shall be shown, the external context they

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[46]The Intervenors actually engaged in prestidigitation to make it appear that *McConnell* employed an intent-and-effect test instead of a functional-equivalence narrow-tailoring analysis by cut-and-paste rearrangement of what this Court actually said in *McConnell*. *See* Intervenors' Br. at 2, 9, 19 (substituting *McConnell*s intent-and-effect language where the functional equivalence language belongs in an apparent effort to substitute an intent-and-effect test for the functional-equivalence narrow-tailoring analysis). Where Intervenors do speak of functional equivalence, they repeatedly precede it with "likely," *see, e.g., id.* at 23 ("likely to function as express advocacy"), trying to substitute the weaker idea of "likely" functional equivalence for *McConnell*'s more demanding concept: "*are* the functional equivalent of express advocacy." 540 U.S. at 206 (emphasis added).

[47]If the application of the prohibition to a communication depends on the results of an external intent-and-effect investigation, then the prohibition is unconstitutionally vague as applied. No one could know when speech is protected. It should also be noted that the FEC in *WRTL I* expressly

urge is statutorily and constitutionally non-cognizable. But for present, note that *McConnell* created no intent-and-effect test.

It is, of course, true that after establishing functional equivalence as its narrow-tailoring analysis *McConnell* went on to say, "The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." 540 U.S. at 206. This intent-and-effect language was merely descriptive of the sham ads that had just been declared to be "the functional equivalent of express advocacy" and is not (nor could it be) a constitutionally-permissible test in and of itself. The district court correctly held that the proper functional equivalence analysis is limited to "consideration [of] language within the four corners of the . . . ads." JS App. 22a.[48] It said that an intent-and-effect test is "practically unacceptable because as-applied challenges . . . must be conducted during the expedited circumstances of the closing days of a campaign when litigating contextual framework issues and expert testimony analysis is simply not workable." JS App. 19a. "More importantly," the court added, "it is theoretically unacceptable because it proceeds on the highly questionable assumptions that: (1) any subjective intent to affect the election, regardless of its degree of importance, should negate an otherwise genuine issue ad; and (2) . . . experts can *actually* project the 'likely' impact of a given ad on the electoral process." JS App. 19a-20a.[49] It wrote that the Supreme Court had already recognized

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eschewed an intent test. Br. for Appellee at 39, *WRTL I*, 546 U.S. 410 (No. 04-1581) ("A constitutional standard that turned on the subjective sincerity of a speaker's message would likely be incapable of workable application; at a minimum, it would invite costly, fact-dependent litigation.").

[48]There is, of course, the relevant context of the elements of an electioneering communication and whether the communication focuses on a current legislative or executive branch matter. *See supra* n.30.

[49]The district court expressed skepticism about expert prognostication after considering the efforts of two defense experts in this case. JS App. 19a-

that "delving into a speaker's subjective intent is both dangerous and undesirable when First Amendment freedoms are at stake." JS App. 20a. The district court pointed to the Supreme Court's rejection of an intent-and-effect test in *Buckley*, 424 U.S. at 43 (*citing* with approval *Thomas*, 323 U.S. at 535). JS App. 20a-21a.

McConnell did not purport in any way to overrule *Buckley* on this point, which is central to free expression, by referring to "intent" and "effect." 540 U.S. at 206. *McConnell* had already specifically connected this "intent" language to the sham "Yellowtail Ad" as being an ad "no less clearly intended to influence the election" than an express advocacy ad. 540 U.S. at 193 & n.78. So it was not creating a new "intent and effect" test for determining whether a communication is "the functional equivalent of express advocacy."

Rather, *McConnell* was simply citing language used by defense expert Kenneth Goldstein, who used student coders to separate ads provided to them into the categories of "Genuine Issue Ads" or "Electioneering Ads." *Amended Expert Report of Kenneth M. Goldstein on Behalf of Intervenor Defendants* at 24, *McConnell*, 251 F. Supp. 2d 176, 2002 WL 33100340 (No. 02-581 and consolidated cases).[50] "Specifically, coders were asked whether the purpose of the ad was to 'generate support or opposition for candidate,' or to 'provide information or urge action.'" *Id.* at n.20. Based on the coders' perceptions and his analysis, Goldstein argued "that BCRA's definition of Electioneering Communications accurately captures those ads that *have the purpose or effect of supporting candidates for election to office*." *Id.* at 26 (emphasis added). *McConnell* was plainly echoing that conclusion for purposes of its broad-brush facial-

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20a, *See supra* at 18-22 (discussing experts' opinions).

[50]Goldstein's report, as presented to this Court in Vol III of the Joint Appendix is available at http://www.law.stanford.edu/publications/ projects/campaignfinance/. In this Court's *McConnell* records, the report was in Defendants' Exhibits, Vol. 3, Tab 7.

challenge analysis as a mere description of those ads that were the "functional equivalent of express advocacy," not creating a new and constitutionally problematic test based on criteria this Court had already rejected.

Moreover, *McConnell*'s expert-endorsed PBA Ad, *infra* at n.65, was declared a "genuine issue ad" based on its content, not contextual probing into intent and effect. The same was true of all the ads coded by Dr. Goldstein's student coders for the *Buying Time* studies that were central to the *McConnell* evidence. *See, e.g., McConnell*, 251 F. Supp. 2d at 307 (Henderson, J.) ("The students were asked to 'code' the ads based on their content."). And the Prime Sponsors Rule, a grassroots lobbying exemption rule proposed to the FEC in 2002 by Senators McCain and Feingold and other prime BCRA sponsors, likewise examined the four corners of a communication and required no contextual investigation into intent and effect. *See* Bopp & Coleson, *Distinguishing* at 407-08 (Appendix). So based on practicality, constitutional imperative, and the Appellants' failed effort to prove cognizable intent and effect through discovery and expert testimony, the district court rightly rejected any reliance on an intent-and-effect test to distinguish genuine from sham issue ads.

H. *McConnell Did Not Shift the Burden of Proof.* Another effort to shift the burden to WRTL attempts to extract from *McConnell*'s facial overbreadth analysis (i.e., how substantial was the prohibition's impingement on "genuine issue ads") a rule governing as-applied challenges (which were not at issue and not the topic).[51] The locus of this argument is *McConnell*'s statement about how substantial the prohibition of genuine issue

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[51] It should be recalled that the FEC and intervenors in *McConnell* urged the Court not to consider any as-applied challenges in that facial challenge, and then the FEC insisted in *WRTL I* that no as-applied challenges were permitted, which the Chief Justice termed "... classic bait and switch." Transcript of Oral Arg. at 25, *WRTL I*, 546 U.S. 410 (No. 04-1581). So *McConnell* could not have decided as-applied challenges, and especially not in the midst of a *facial substantial overbreadth* analysis.

ads might be in the future: "Moreover, whatever the *precise percentage* may have been in the past, in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U.S. at 206 (emphasis added).

The reference to "precise percentage" at the beginning of this sentence (often excluded by those attempting to convert this facial overbreadth analysis into an as-applied statement) indicates that this sentence is about the facial challenge question of how substantial was the alleged overbreadth. This sentence, within the discussion of just how many genuine issue ads were captured by the prohibition as compared to sham issue ads, began by noting that "[t]he *precise percentage* of issue ads that clearly identified a candidate and were aired during those relatively brief preelection time spans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court." *id.* (emphasis added), and concluded that the "*vast majority*" of ads were not genuine issue ads. *Id.* (emphasis added). The italicized words about "percentage" and "majority" clearly indicate that the "in the future" comment was *only* about the substantiality of the alleged overbreadth. It could not have been about future as-applied challenges in any event, because neither future cases nor as-applied challenges were before the Court.

So the "in the future" comment, in context, was about lack of overbreadth in the future. The Court was considering the "percentage" of "genuine issue ads" that would be captured by the prohibition (as compared to the "sham issue ads" that *McConnell* recognized were the intended target of the prohibition) in order to determine whether the overbreadth was sufficiently broad for facial invalidation. After noting that the experts had fought over the "precise percentage," the Court declared that prospectively the overbreadth could be reduced in any event because, with knowledge of the prohibition, speakers

could take measures to avoid the prohibition's reach in some situations.[52] But this "in the future" statement could not apply to *all* situations because the Court immediately left open as-applied challenges by recognizing the category of "genuine issue ads" and expressly stating that it "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *Id.* at 206 n.88. *See also WRTL I*, 546 U.S. 410 (as-applied challenges permitted despite argument based on "in the future" statement).[53] So the meaning of the "in the future comment" is confined to its context and simply means that prospectively the

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[52]Judge Leon used nearly identical "future" language in holding that the primary definition of electioneering communication was unconstitutionally overbroad and likely to be higher in a "particularly contentious, or active, legislative period." 251 F. Supp. 2d at 798-99. "[T]here is reason to believe that the amount of issue advocacy likely to be generated *in future election cycles* will be at least as substantial as it was during those years," he continued. *Id.* at 799 (emphasis added). The Supreme Court was simply answering Judge Leon's argument by saying that "in the future" percentages might actually drop in light of people's knowledge of the elements of the prohibition, making overbreadth less substantial.

[53]The "in the future" comment was part of the two-part facial overbreadth analysis for which *McConnell* cited 540 U.S. at 207, the leading case of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). *McConnell* summarized its holding under the two parts as follows: "Far from establishing that BCRA's application to pure issue ads is substantial, either in an absolute sense or *relative to its application to election-related advertising*, the record strongly supports the contrary conclusion." 540 U.S. at 207 (emphasis added). The discussion of "pure issue ads," *id.*, or "genuine issue ads," *id.* at 206 & n.88, was to establish that the prohibition was not overbroad in the context of "election-related advertising," *id.* at 207, which included both "electioneering ads" and "genuine issue ads," to use the terminology of defense expert Goldstein in his report in the *McConnell* litigation. Consequently, this Court was required by its analysis to talk about "genuine issue ads" in its facial overbreadth analysis. It was not gratuitously throwing in words about "genuine issue ads" that were irrelevant to its analysis and intended to be employed outside that context. Its "in the future" sentence had a distinct meaning in the facial overbreadth analysis context, but none beyond it.

overbreadth of the prohibition is not sufficiently substantial for facial invalidation. The comment may not be ripped from its context and forced to mean things entirely foreign to its plain contextual meaning. The comment does not shift the strict scrutiny burden from the government and force challengers to prove that the mentioned options are inadequate. It does not say that the other options are adequate for genuine issue ads. In fact, the Court clearly held that the PAC option was "constitutionally sufficient" only as to "*express advocacy*." 540 U.S. at 203 (emphasis added). Only to the extent that an ad can be proven by the government to be the "functional equivalent of express advocacy," *see id.* at 206, is the PAC option adequate. So *McConnell* only employed facial overbreadth analysis to sustain the prohibition and left for another day distinguishing "genuine" from "sham."[54]

There are also burden-shifting efforts to equate this case to cases where groups to which a *disclosure* provision would validly apply must demonstrate that they should be exempted

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[54]Another attempted burden-shifting argument is to the effect that once a facial challenge has been rejected no exception may be granted that goes to the core of what the prohibition sought to limit. FEC Br. at 18, 32, 38-39. The BCRA legislative history, the 2002 FEC electioneering communication rulemaking, and the *McConnell* litigation clearly reveal that (a) *sham* ads were the target of the prohibition and "genuine issue ads" were to be protected and (b) genuine issue ads can be distinguished from sham ads. *See infra* at Part IV and Bopp & Coleson, *Distinguishing* at 365. Since WRTL's ads are clearly "genuine issue ads" like the PBA Ad, this burden-shifting argument fails and, to the extent that these ads are at the "core" or "heartland" of the prohibition, then the facial upholding of the prohibition must be overruled. *See infra* at Part V. Another attempt to shift the burden is based on the notion that once a provision is upheld facially then all as-applied challenges shift the burden to the challenger (on the notion that because a communication here falls within the electioneering communication prohibition it must be considered presumptively a sham ad and the burden immediately shifts to WRTL to prove it is a genuine issue ad). *See* FEC Br. at 33-34. This flies in the face of this Court's unwavering requirement that burdens on First Amendment liberties must be justified by the government.

from disclosure because it would put their members at risk.[55] But such a balancing of harms is not appropriate to this case because the prohibition does not validly apply to "genuine issue ads," of which WRTL's are examples.[56] As to such genuine issue ads, the asserted interests are not compelling, and even if they were, the prohibition is not a narrowly-tailored, least-restrictive means of dealing with the asserted interest. *See* Part III. So this case is like *MCFL*, where (a) the FEC's asserted corporate-form interest was held not compelling as to *MCFL*-corporations, (b) the FEC's asserted interest in a bright-line test was held not compelling at all, and (c) the FEC's asserted interest in protecting donors was held neither compelling nor served by the prohibition when there were less restrictive means. *MCFL*, 479 U.S. at 259, 263, 260-61 (respectively).

I. ***The Avoidance-Option Is Inadequate.*** As just demonstrated, *McConnell*'s "in the future" comment (a) was only about the substantiality of asserted overbreadth, (b) could not have decided any future as-applied case, and (c) did not shift the burden to WRTL. *See supra* at Part II. And requiring WRTL to avoid using grassroots lobbying communications that meet the electioneering communication definition (the "avoidance-

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[55]Examples of such cases are *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982).

[56]Even under a balancing of harms test, however, "genuine issue ads" must be protected because in a republic the people's sovereign right to participate in self-government through the express liberties of expression, expressive association, and petition of their representatives clearly outweighs the interest of incumbent politicians in avoiding (at most) being criticized for their official actions near an election, in which they have chosen individually to run for reelection and collectively to remain in session (and highly active legislatively) in the periods preceding elections. And even if it were proper to shift the burden of proof, WRTL has established that its "genuine issue ads" pose no cognizable risk to the integrity of elections that would justify the prohibition and that a judicial test may be stated for future ads. *See infra* at Part IV.

option") or to justify why those options are not suitable would impose such a burden on WRTL's constitutional rights that it would itself trigger strict scrutiny because these alternatives are all less effective and constitutionally inadequate.

1. Not Broadcasting Is Inadequate. Using alternative means of communication, such as newspaper ads, is inadequate. Judge Kollar-Kotelly found in *McConnell* that broadcasting is the most effective means for the sort of communications at issue here. 251 F. Supp. 2d at 569-73. The obvious reason why Congress banned only broadcast ads is that they are the most effective, which is why WRTL chose broadcast ads. Barbara Lyons, the long-time executive director of WRTL, with many years of experience in promoting WRTL's issues, Record 76, Attachment 1 at 10 (2d Lyons Affid. ¶ 1), verified that broadcast advertising is the most effective means of grassroots lobbying for WRTL and that "non-broadcast communications would not provide WRTL with sufficient ability to reach the people of Wisconsin with WRTL's message," Record 30:10 (*AVC* ¶ 51), which WRTL's advertising consultant confirmed. Record 81-2:156 (Vandergound Dep. 14:21-17:8); Record 81-2:171 (Vandergound Dep. 76:12-77:5). And it is not the role of government to tell citizens how best to communicate: "The First Amendment protects [WRTL's] right not only to advocate [it's] cause but also to select what [it] believe[s] to be the most effective means for doing so." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

2. Non-Incorporation Burdens the Association Right. The most effective means of gathering, analyzing, and disseminating the necessary legislative information is through citizen watchdog groups created by the people. *See Buckley*, 424 U.S. at 22 (association permits amplified speech). The most effective form for these groups is the nonprofit corporation, not to amass business income, which nonprofits do not do, but to facilitate capable leadership by protecting directors and officers from individual liability for acts of the group. Conditioning one's

right to do grassroots lobbying on not incorporating imposes a significant obstacle to the group's speech, association and petition activities.

3. Other Times Are Inadequate. Requiring grassroots lobbying to be conducted before the blackout periods severely compromises the effectiveness of the lobbying. In this case, the blackout period was for 80 days and it is important to run the advertising up to the time of the vote. *See supra* at 12-17 (and the level of public interest is a prime consideration, too). Grassroots lobbying is customarily done when a bill or matter or an issue is directly before the Congress and it tends to be run in the period leading up to the scheduled votes. *Id.*

4. Not Naming a Candidate Is Inadequate. Grassroots lobbying is ineffective without telling constituents to whom their call should be made. Often, only one or two members of Congress in a state have a position on legislation that differs from others and so would be the object of grassroots lobbying. And many citizens do not know the names of their members of Congress, so would not know whom to call. A statute requiring that grassroots lobbying ads ask listeners to simply "Call your member of Congress," without naming the legislator needing calls, would render grass-lobbying ineffective. As the evidence in this case shows, naming a candidate is typical in grassroots lobbying and is needed. *See supra* at 18-19.[57] So it would not

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[57]Judge Leon singled out grassroots lobbying as being of special concern, providing a rationale from the record as to why it is necessary to *name* a legislator in such situations:

> The mere fact that these issue advertisements mention the name of a candidate (i.e., the elected representative in whose district the advertisement ran) does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes. To the contrary, the testimony of various plaintiffs' witnesses indicates that, in their experience, there are many reasons why it is helpful, if not necessary, to mention a candidate's name in these advertisements in order to focus the public's attention on a particular pending piece of legislation. For example, Paul Huard of NAM

have been as effective for WRTL to simply direct recipients to the Senate switchboard or to the BeFair.org website to find out who to lobby.

5. Not Targeting Is Inadequate. Grassroots lobbying must target the constituents in order to be effective because these constituents are the members of the public to whom the public official is responsible.

III. The Prohibition Fails Strict Scrutiny as Applied.

For restricting activity at the core of the American system of representative government, no blunt instruments are permitted. *MCFL*, 479 U.S. at 264-65. Appellants must establish that the prohibition as applied is the narrowly tailored, least restrictive means, to further a compelling governmental interest. *See, e.g.*, *White*, 536 U.S. at 774-75; *MCFL*, 470 U.S. at 262.

A. *Asserted Interest.* *McConnell* pointed to the already recognized "compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office," 540 U.S. at 205, to which sham issue ads were

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states "[t]here are many reasons that an issue ad may need to refer to the name of an elected official or candidate. Many bills are identified with particular sponsors and may be known by the sponsors' names. Also, both incumbents and candidates may be prominent people whose support or opposition to a bill or policy may have important persuasive effect. . . . Also, if an issue ad is used to explain why a legislative position of a particular Member of Congress is good for his or her district or state, the member generally must be mentioned. *The same is true if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position.*" Huard Decl. ¶ 12 (emphasis added); *see also* Finding 293. Similarly, Denise Mitchell, Special Assistant for Public Affairs to the AFL-CIO, concurred, explaining that it is often necessary to refer to a federal candidate by name because "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question." Mitchell Decl. ¶ 11; *see also* Finding 293.

McConnell, 251 F. Supp. 2d at 794 (emphasis in original).

the "functional equivalent." *Id.* at 206. But since only *corporations* are prohibited (and unions for parity) from funding electioneering communications, the interest actually underlying the prohibition is the corporate-form interest, which *McConell* acknowledged: "The . . . question— whether the state interest is compelling—is easily answered by our prior decisions . . . , which represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (quotation marks and citations omitted). So the issue is whether (1) the corporate-form interest is compelling here and (2) the prohibition is the narrowly-tailored, least-restrictive way to protect the corporate-form interest (if compelling) as to a "genuine issue ad," such as the WRTL's ads.

B. ***Narrow Tailoring.*** As demonstrated in Part IV. WRTL's ads are not the "functional equivalent of express advocacy," *Id.* at 206, because they are "genuine issue ads," *Id.* at 206 n.88, not shams. Rather, they are grassroots lobbying. The concern about such ads affecting elections, which is the corporate-form interest identified in *McConnell*, is not present, *see Austin*, 494 U.S. at 678 (Stevens, J., concurring) ("[T]here is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other"), and so does not apply. There is no corruption flowing from corporate efforts to lobby legislative or executive branch officials. *See Bellotti*, 435 U.S. at 776-78, 790-96, *Noerr*, 365 U.S. at 135, 137-38.

C. ***Less Restrictive Means.*** Strict scrutiny of the prohibition readily reveals two less restrictive means of dealing with the corporate-form concern and the overlaid functional-equivalence concern. The first eliminates the corporate-form concern by eliminating corporate money, which is discussed here. The second, which is the focus of Part IV, retains corporate money but eliminates the functional-equivalence concern by defining grassroots lobbying narrowly. These are sufficient to show that

the prohibition is not narrowly tailored as applied.

When it enacted BCRA, Congress had before it one less restrictive means of eliminating any concerns about corporate-form corruption, namely, "a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence . . . directly to this account for electioneering communications . . . ."[58] WRTL stated in its complaint that it would make all disbursements for electioneering communications from such an account if the court would not grant relief from the prohibition as to disbursements from its general account. Had Congress enacted this segregated bank account option in place of the prohibition, Congress would have entirely eliminated corporate-form corruption concerns because the corporation would not have been using any money from business activity or receipts from other corporations. Therefore, the prohibition is unconstitutional as applied.[59]

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[58]2 U.S.C. § 434(f)(2)(E). Congress said that an entity permitted to broadcast electioneering communications and required to report disbursements for them, would only have to report contributors of $1,000 or more to that *account* (as opposed to general fund donors) if it made its disbursements for electioneering communications from such a segregated bank account.

[59]Yet another means that would be less restrictive on the people's First Amendment liberties would be for Congress to recess during elections along the British model, e.g., Congress might recess for sixty days before general elections and thereby reduce the need for grassroots lobbying during these times. Two Appellants' amici curiae have suggested a shorter prohibition period. *See, e.g.*, Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 Minn. L. Rev. 1773, 1802 (2001) ("[n]arrow drafting may include shorter time periods (for example 30 days rather than 60 days"). It must be remembered that part of the perceived problem that is set out to justify the prohibition is based on matters out of the hands of the people, namely, (a) Congress remains in session in prohibition periods, (b) prohibition periods are particularly intense and important legislative times, *see* 251 F. Supp. 2d at 911 (Leon, J.) (prohibition periods "are often periods of intense legislative activity" and "[s]ome of the

D. *McConnell's Other Concerns Not Implicated.* Grassroots lobbying does not implicate *McConnell*'s other expressed concerns about "sham issue advocacy." 540 U.S. at 132. First, the Court noted that such ads "could be aired without disclosing the identity of, or any other information about, their sponsors." *Id.* In fact, the Court noted, "sponsors of such ads often used misleading names to conceal their identity." *Id.* at 128 (providing examples), 196-97 ("concealing their identities," "dubious and misleading names").

This case implicates none of these concerns. Because WRTL does not challenge the disclaimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of all electioneering communications, both as to disclaimers and public reports. The whole system will be transparent. With all this information, it will then be up to the people to decide how to respond to the call for grassroots lobbying on a particular governmental issue. And to the extent that there is a scintilla of perceived support or opposition to a candidate, a remote possibility necessitated by the people's sovereign right to participate in representative government, the people, with full disclosure as to the messenger, can make the ultimate judgment. "Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." *Bellotti*, 435 U.S. at 792 n.31. "The First Amendment rejects the 'highly 'paternalistic' approach . . . ." *Id.*

Furthermore, the desirability of a "bright-line rule" does not defeat this as-applied challenge. This Court has already held that where constitutional justification is absent, the "desire for a bright-line rule. . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL*, 479 U.S. at 263 (emphasis in origi-

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President's or Attorney General's boldest initiatives are advanced during election years often within 60 days of an election"), and (c) incumbents become candidates because they choose to run for reelection.

nal).[60] However, a bright line favoring, rather than suppressing, expression, association, and petition is helpful to the people, and one can be developed, as shown next.

IV. Genuine Issue Ads Can Be Adequately Identified and Exempted from the Prohibition.

As the district court correctly held, the prohibition may not constitutionally be applied to WRTL's ads because they are neither "the functional equivalent of express advocacy," JS App. 26a (*citing McConnell*, 540 U.S. at 206), nor was there any "link" between the ads and Sen. Feingold's fitness for office. JS App. 27a. Such genuine issue ads can be adequately identified and exempted from the electioneering communication prohibition. *See also* Bopp & Coleson, *Distinguishing* at 386 (setting out suggested test with analysis).

A. *The Unfulfilled Promise.* A promise was made by BCRA's sponsors, when Congress debated the electioneering communication prohibition, that "genuine issue ads" and the subset of grassroots lobbying would not be prohibited. "Genuine issue ad" was a term of art used throughout BCRA's enactment and the *McConnell* litigation, including by this Court. 540 U.S. 206 n.88 ("[W]e assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads."). *See supra* at 7-8 (use as a term of art by *McConnell* experts and lower court).

Senator Jeffords (who introduced the Snowe-Jeffords amendment that became the prohibition) declared on the Senate floor that the prohibition

> will not affect the ability of any organization to urge *grassroots contacts* with lawmakers on upcoming votes. The Snowe-Jeffords provisions do not stop the ability of

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[60] In any event, the Court could adopt a bright-line test for grassroots lobbying that is every bit as bright as the exception for *MCFL*-type corporations created in *MCFL*. 479 U.S. at 263-64. The sort of "genuine issue ads" that constitute grassroots lobbying can be neatly cabined without placing any burden on the courts or the FEC.

> any organization to urge their lawmakers on upcoming issues or votes. That is one of the biggest distortions of the Snowe-Jeffords provisions. Any organization can, and should be able to, use their *grassroots communications* to urge citizens to contact their lawmakers. Under the Snowe-Jeffords provision, any organization still can undertake this most important task.

147 Cong. Rec. S2813 (emphasis added).

Co-sponsor Sen. Snowe said: "[L]et's look at the *genuine issue ad*, . . . which this provision would not apply to." 147 Cong. Rec. S2458 (emphasis added). Senator Paul Wellstone in offering an amendment to the Snowe-Jeffords Amendment that would eliminate an exemption from the prohibition for non-profit organizations (under I.R.C. §§ 501(c)(4) or 527) declared that genuine issue ads were not the target: "I am not talking about ads . . . that are legitimately trying to influence policy debates." 147 Cong. Rec. S2846. He emphasized his point by repetition, "I am not talking about legitimate policy ads. I am not talking about ads that run on any issue." *Id.*

From these statements by BCRA's prime sponsors of the electioneering communication prohibition, it is clear that the congressional intent was to exclude grassroots lobbying ads. But Congress left creation of the exemption to FEC rulemaking, giving it authority to make exemptions, provided that no exempted communication "promotes or supports . . . or attacks or opposes a candidate" (called "PASO"). 2 U.S.C. § 434(f)(3)(B)(iv). So when the FEC did its 2002 electioneering communications rulemaking it solicited comments on four proposed alternatives for a grassroots lobbying exemption. 67 Fed. Reg. 51131. *See* Bopp & Coleson, *Distinguishing* at 407 ("FEC Proposed Rules for Comment" included in Appendix collecting rule proposals).

The BCRA prime sponsors proposed specific wording for a grassroots lobbying exemption and told the FEC that it had authority to enact their rule under BCRA. *Id.* at 407-08 (Prime

Sponsors Rule in Appendix).[61] This lends weight to the legislative history indicating that a grassroots lobbying exemption was intended, and it reveals that the prime sponsors believed that a rule could be fashioned that would meet the statutory PASO requirement.

But the FEC decided that the prime sponsors' statement that their rule complied with congressional intent as to the PASO standard was wrong, "conclud[ing] that communications exempted under any of the alternatives for this proposal could well be understood to promote, support, attack, or oppose a Federal candidate." Electioneering Communications, 67 Fed. Reg. 65190, 65201 (Oct. 23, 2002). What governed under this FEC statement was hearer perception, and the FEC's apparent belief that any reference to an issue and a candidate could be viewed as influencing an election. As a result, the FEC's understanding of PASO clearly encompassed communications having only the remotest speculative possibility of some minimal electoral effect.[62] The FEC's extremely broad PASO interpretation was a precursor to the FEC's position here that

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[61] *See also Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords* at 10 (attached to Letter from Sen. John McCain, Sen. Russell D. Feingold, et al. to Mai T. Dinh of the FEC (Aug. 23, 2002)), available at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf.

[62] One effect of the FEC's refusal to make a rule was that it retained the sole authority to make any exceptions through the advisory opinion mechanism. The FEC made an exception to the prohibition when it said, in FEC Advisory Opinion 2004-31, that candidate Russ Darrow, Jr.'s name could be used in what were otherwise electioneering communications by the automobile dealerships that he founded and that bore his name, but were now under the day-to-day control of his son, Russ Darrow III. Of course, the self-government rights at issue herein go far beyond such commercial speech. Another effect is that grassroots lobbying during prohibition periods, especially the highly active legislative period before general elections, seems to have largely disappeared, likely due to the burdens of the PAC option.

now (1) sees a genuine issue ad as an empty vessel into which it can pour PASO intent based on an investigation into external matters that are neither statutorily nor constitutionally cognizable and (2) believes it can regulate anything having some speculative, remote electoral effect. *See supra* at 19.

In 2006, the FEC twice rejected requests to make a rule protecting genuine grassroots lobbying, *see* Bopp & Coleson, *Distinguishing* at 360-61, even after this Court in January of that year expressly pointed to the FEC's authority to promulgate a grassroots lobbying exception. *WRTL I*, 546 U.S. 410, 126 S. Ct. at 1017. At the *WRTL I* oral argument, Justice Breyer noted that "[Congress] told the FEC to go and produce a set of regs that would, in fact, try to screen out that legitimate 7 percent [of genuine issue ads]," and then asked the Solicitor General, "why haven't they done it?" Transcript of Oral Arg. at 43-44, *WRTL I*, 546 U.S. 410 (No. 04-1581).

B. *The Concession.* Senator McCain and other BRCA Prime Sponsors submitted a rule in the 2002 FEC rulemaking, which was joined by counsel and groups briefing this case and which focused on the text of the ad itself (along with the relevant context, *see supra* at n.30, not on an external intent-and-effect context.[63] The Center for Responsive Politics

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[63]**Prime Sponsors Rule:** In the 2002 FEC rulemaking on electioneering communications, the BCRA prime sponsors (**Sen. McCain**, Sen. Feingold, **Rep. Shays**, **Rep. Meehan**, et al.—bolded names representing intervenors in the present case) proposed the following rule for an exemption as being within the FEC's authority and properly distinguishing genuine from sham grassroots lobbying:

> The term "electioneering communication" does not include any communication that:
>
> ****
>
> (x)(A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter; (ii) the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or

proposed a similar rule, only it allowed communicators to actually name the person who was the target of the grassroots lobbying. *See* Bopp & Coleson, *Distinguishing* at 408 (text of CRP Ad). In light of these prior proposals conceding (a) that genuine issue ads can be distinguished from sham ads and (b) that the distinction can be made on the basis of a four-corners rule (with relevant context) and without any intent-and-effect investigation, it is surprising to see the Intervenors, their counsel, and amici now trying to switch sides. A distinction is clearly possible, and it can be done on a four-corners rule. *See also* Bopp & Coleson, *Distinguishing* at 381-84 ("Necessity of Focusing on the Text").

C. *Cognizable Effect.* In formulating a test for genuine issue ads, the mere possibility of some incidental, de minimis effect on an election would not be constitutionally cognizable as a governmental interest. The FEC has already conceded this before the Supreme Court in *WRTL I* when Justice Scalia asked: "You think Congress has the power to prohibit any First

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executive branch matter; and (iii) the communication refers to the candidate only by use of the term "Your Congressman," "Your Senator," "Your Member of Congress" or a similar reference and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the communication contains no reference to any political party.

(B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate's record or position on any issue; (ii) the candidate's character, qualifications or fitness for office; or (iii) the candidate's election or candidacy.

Detailed Comments of BCRA Sponsors Senator John McCain [et al.] at 10.

The following participants in present briefing joined in proposing this rule: The Campaign and Media Legal Center (**Campaign Legal Center**), *see* Letter from Glen Shor to Mai T. Dinh at 10-11 (Aug. 21, 2002) (**Trevor Potter** named therein as General Counsel); **Common Cause** and **Democracy 21**, Letter from **Donald J. Simon** to Mai T. Dinh at 12 (Aug. 22, 2002) (adding that "this proposed exception properly balances the competing concerns" and avoids "sham communications"). Comments available at http://www.fec.gov (archive re electioneering communication rulemaking).

Amendment . . . conduct that might have an impact on the election? I mean, is that the criterion for whether it . . . can be prohibited?" Transcript of Oral Arg. at 31, *WRTL I*, 126 S. Ct. 1017 (No. 04-1581). The Solicitor General responded: "No, Justice Scalia, it's not." *Id.* And after extensive discovery and employing two experts, the FEC could only come up with the possibility that WRTL's ads might have some unquantifiable "electoral effect."[64] The district court reviewed the FEC's best efforts to prove this electoral effect at summary judgment and then rejected the "highly questionable assumption[] that . . . the speculative conjecture of experts can *actually* project the 'likely impact' of a given ad on the electoral process," for which assumption it did not find "sufficient evidence." JS App. at 20a (emphasis in original). So the government could not meet its strict scrutiny burden to prove that it has a cognizable interest in regulating WRTL's ads.

D. *The Prototype.* Since the PBA Ad[65] was identified by the

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[64]*See, e.g.*, Record 81:17 (FEC Mem. Supp. Mot. SJ at 9) (FEC argued that the ads "would likely have had a significant electoral effect."). But what Bailey said at deposition was that WRTL's "Waiting" ad "*could* have, *could* have, it *might have no impact*, but *could* have substantial impact on the election itself." JA 148(emphasis added). Moreover, when called upon to compare the Waiting Ad, JS App. at 5a n.5 to the PBA Ad, *infra* at n.65, Bailey thought that WRTL's ad was more subtle and so might be more effective in influencing elections, JA 147-48, which, by logical extension, yields the remarkable proposition that the *less* an ad is the functional equivalent of express advocacy the stronger the government interest is in regulating it.

[65]**PBA Ad:** This was called the "Feingold Kohl Abortion 60 Ad," but as its topic is partial-birth abortion ("PBA"), that name is more memorable:

> America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and exposed [sic] of their newborn baby in a dumpster. Most Americans couldn't believe that this defenseless human life could be so coldly snuffed out. But incredibly, if a doctor had been present that day in Delaware and delivered the infant, all but one inch from full birth and then killed him it would have been perfectly legal. Instead of murder or

FEC experts in *McConnell* as a "genuine issue ad," and since it was a grassroots lobbying ad run by a pro-life group that also mentioned Senators Kohl and Feingold, it provides the logical prototype for determining the factors that identify genuine issue ads. *See* Bopp & Coleson, *Distinguishing* at 385-86 (more fully discussing following proposal). It serves as both a good pattern for creating a test and a benchmark for determining if other elements are required.

In particular, the PBA Ad has three essential features that establish that it is a grassroots lobbying ad that may not constitutionally be prohibited under § 441b as an electioneering communication. *First*, based on the content of the communication, it focuses on a current[66] legislative branch matter, takes a position on the matter, and urges the public to ask a legislator to take a particular position or action with respect to the matter in his or her official capacity. *Second*, the ad does not mention any election, candidacy, political party, or challenger, or the official's character, qualifications, or fitness for office. *Third*,

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> manslaughter, it would have been called a partial-birth abortion. Killing late in the third trimester, killing just inches away from full birth. Partial-birth abortion puts a violent death on thousands of babies every year. Your Senators, Russ Feingold and Herb Kohl voted to continue this grizzly [sic] procedure. Contact Senators Feingold and Kohl today and insist they change their vote and oppose partial birth abortion. Their number in Washington is 202-224-3121.

McConnell v. FEC, 251 F. Supp. 2d 176, 312 (D.D.C. 2003) (Henderson, J.) ("[sic]" included in Henderson opinion).

[66] *Current* requires that the ad not talk about a past issue, but one under current consideration, which *McConnell* district court judges found to be a useful way to distinguish genuine from sham issue ads. *See, e.g.*, *McConnell*, 251 F. Supp. 2d at 577 (Kollar-Kotelly, J.) (rejecting ad as genuine for "failing to note whether there was any upcoming legislation related to the past votes that the advertisement might have been targeting"), 918 (Leon, J.) (examples of "candidate-centered ads" cited past votes of legislators). This requirement eliminates the "Jane Doe" ad cited in *McConnell* as being a sham. 540 U.S. at 126-27.

as long as the ad follows this pattern, the fact that the ad states the position of the candidate on the matter, which is objectively accurate and based on publicly available means of verification, and praises or criticizes the candidate for that position, does not effect its genuineness.

Analytically, the first part makes the ad a grassroots lobbying ad and, by its "focus," eliminates cognizable electoral effect. The second part further assures a lack of such cognizable effect, by not mentioning anything about the election or "the official's character, qualifications, or fitness for office." And the third part allows a forceful discussion of the merits of the matter, which merely say that the public official is wrong or right on the issue, not wrong for office.[67]

E. *WRTL's Ads Meet the PBA Ad Test.* WRTL's ads are materially indistinguishable from the PBA ad. *First*, WRTL's ads focus on a current legislative branch matter, take a position on the matter, and urge the public to ask their two Senators to take a particular action with respect to that matter in their official capacity. *Second*, the ads do not mention any election, candidacy, political party, or challenger, or the Senators' character, qualifications, or fitness for office. *Third*, while

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[67]For example, in *Christian Civic League of Maine, Inc. v. FEC*, 433 F. Supp. 2d 81 (D.D.C. 2006), the Crossroads Ad at issue said, "Unfortunately, your senators voted against the Marriage Protection Amendment two years ago." *See* Bopp & Coleson, *Distinguishing* at 404 (text of Crossroads Ad in Appendix). The district court, however, erroneously adopted the FEC's argument in stating that "the League's advertisement – which characterizes Senator Snowe's past stance on the Marriage Protection Amendment as "[u]nfortunate[]" – is the sort of veiled attack that the Supreme Court has warned may improperly influence an election" and so pronounced it a "sham." *CCLM*, 433 F. Supp. 2d at 89 (opinion denying motion for preliminary injunction). Even though Sen. Snowe was running unopposed in a primary election, the district court insisted that "the advertisement might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection." *Id.*

permissible, the ads do not state the position of the candidate on the matter, nor do the ads praise or criticize the candidate for that position.[68]

The sole focus of the ads was imminently pending, specific legislative activity while Congress was in session, the timing of which was beyond the control of WRTL. The ads asked for calls to *incumbent* Senators who clearly had power to immediately affect the filibuster activity. These are unlike the "sham issue ads" that ask hearers to call candidates, even non-incumbents, about something vague, abstract, unfocused, and/or possibly in the past. The only reference to Sen. Feingold was in the closing call to his constituents to contact him and ask him to oppose the filibusters. As Judge Leon noted, even a *McConnell* defense expert concluded that an ad mentioning a

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[68]Material at the website www.BeFair.Org cannot be incorporated by reference into the WRTL ads because the FEC has never combined different communications to create express advocacy and cannot now do so with electioneering communications (although WRTL's ads would remain genuine issue ads even if the importation were permissible). Each communication stands on its own as to content, which means that other WRTL communications (on the website or elsewhere) cannot be combined with the ads to manufacture absent content in the ads. *MCFL* provides the example. If one of MCFL's newsletters had said "vote prolife" and another said "candidate X is prolife" (as in a voter guide), no express advocacy would have occurred, but if both things were said in the same communication then it would contain express advocacy. *See MCFL*, 479 U.S. at 249. In the last election, AARP ran its "Don't Vote" campaign, which consisted of broadcast ads telling people not to vote until they had visited AARP's website to see the position of the candidates on the issues. If the naming of candidates at AARP's website were incorporated by reference, then AARP's broadcast ads were electioneering communications. Until the FEC brings an enforcement action against AARP, the argument that what is said at BeFair.org is incorporated by reference in WRTL's ads cannot be taken seriously. In any event, the website contained no express advocacy, but did contain numerous ways to contact the Senators (including emailing from within the website), helpful information on federal courts, the judicial nomination process, filibusters, and judicial emergencies. *See* http://web.archive.org/web/20040729081130/http://www.befair.org/.

candidate's name is a genuine issue ad, if "the body of the ad has no referent to [a candidate] whatsoever [and] the only referent to [the candidate] is the call line." 251 F. Supp. at 795.

WRTL's ads asked constituents to call *both* Sen. Kohl and Sen. Feingold, lessening the focus on Sen. Feingold even more and indicating that the issue was filibustering, not Sen. Feingold. The ads dealt with non-candidate Kohl and candidate Feingold equally, not singling Sen. Feingold out in any way. The ads dealt with a long-time, natural concern for WRTL, which would like President Bush's judicial nominees to be appointed, so there is no question of a made-up issue.

Defense expert witness Bailey, agreed that the ads were grassroots lobbying ads, JA 151, referenced a specific current legislative matter, JA 154, did not identify the Senators as a candidates, JA 155, and contained no reference to Sen. Feingold's character, qualifications or fitness for office. JA 155. At most, Bailey thought the ads only "implied" the Senators' position on the issue, since the ads were consistent with the proposition that one or both were undecided, JA 148,[69] and contained no words that promoted, supported, attacked or opposed them. JA 156.

F. *The FEC's Erroneous Subjective Intent Test.* The Appellants contend that the alleged subjective intent of WRTL and the ads alleged electoral effect should be considered, not just the content of the ads. In so doing, Appellants contend that the court should look to external factors such as the activities of WRTL's PAC,[70] statements in WRTL's press releases and

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[69]The fact that WRTL's Ads asked people to call Senators Kohl and Feingold about the filibustering implies nothing about the Senators' positions on the issue. Grassroots lobbying is used to firm up legislators' positions as well as to attempt to change them. So there can be no implication of criticism of either Senator because judicial filibustering was criticized in the ads.

[70]As to PAC activity, the very statutory *prohibition* at issue in this case, expressly *excludes* any consideration of PAC activity, activity of a separate legal entity, *Cal. Med. Assoc'n*, 453 U.S. at 196, in determining whether a

newletters,[71] and the campaign statements of opposing candidates, political parties and other public officials.

This Court has consistently rejected this argument. In *Buckley*, express advocacy was to be found based on the communication itself. *Buckley*, 423 U.S. at 43 (express advocacy "limited to communications that include explicit words of advocacy . . . ."). In so doing, Court rejected a test that depended on the hearers' subjective judgment:

> (W)hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. . . . Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. (internal quotation marks and citation omitted). This Court applied this analysis in *MCFL* by only looking to the text of MCFL's newsletter to find that it contained express advocacy. 479 U.S. at 249.[72]

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corporation has made an independent expenditure or an electioneering communication. 2 U.S.C. § 441b(b)(2)(C) ("*shall not include* . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes" (emphasis added)).

[71]This is an unconstitutional condition, i.e., if you want this benefit you must give up that right, *see, e.g., Healy v. James*, 408 U.S. 169, 180-84 (1972); *Speiser v. Randall*, 357 U.S. 513, 518 (1958), in this case requiring a tradeoff of constitutional rights instead of benefits.

[72]MCFL had a PAC, 479 U.S. at 255 n.8, but this Court never asked what the PAC had said or done in its analysis of whether MCFL's communication contained express advocacy. *MCFL*, 479 U.S. at 249. MCFL had engaged in various legislation-oriented activities, including grassroots lobbying. *Id.* at 242. But this Court never considered any such activity in determining whether there was an independent expenditure. Instead the

As to the "electioneering communication" provision, the law again requires examination of the communication itself and the relevant context (i.e., the factual elements making up the definition). "Electioneering communication" is defined as a "communication" meeting certain criteria. 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29. Nowhere in the definition is there any instruction to see whether the organization's PAC or press releases said. And this Court in *McConnell* upheld the provision based only on an examination of the texts of ads broadcast during the black out period. 540 U.S. at 203-07.

Moreover, the *Noerr-Pennington* line of cases agrees that, where the right to petition is involved, intent and effect cannot be considered. Even in the context of federal antitrust and labor relations law,[73] where no additional First Amendment rights attach, the government cannot prohibit activities, that would otherwise violate antitrust or labor law, when those actions are "'an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.'" *BE & K*, 536 U.S. at 525 (*quoting Noerr*, 365 U.S. at 136). These grass roots lobbying activities were protected "*regardless of intent or purpose.*" *Id.* (*quoting Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965)) (emphasis added). Thus, in this grassroots lobbying case, the alleged intent or purpose of WRTL is also irrelevant.

Court noted that the "Special Edition" of MCFL's *newsletter* said to vote prolife and then identified which candidates were prolife. *Id.* at 249. The sole focus was on the particular *communication* in the newsletter and what its words said, not MCFL's other communications.

[73]The protection for grassroots lobbying recognized in the *Noerr-Pennington* line of cases has been extended to "situations where groups use . . . courts to advocate their causes and points of view," *Cal. Motor Transport*, 404 U.S. at 511, to the context of labor relations law, *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737, 743 (1983), and where groups used the court to advocate in the context of labor relations law. *BE & K*, 536 U.S. 516.

V. *McConnell*'s Facial Upholding Should Be Overturned.

In *McConnell*, this Court rejected a facial challenge to the electioneering communication prohibition on the grounds that, even though "the interests that justify the regulation of campaign speech might not apply to the regulation of issue ads," the statute's application to genuine issue ads did not render it facially overbroad. 540 U.S. at 206-07 & n.88. The arguments raised by Appellants reveal that the *McConnell*'s facial upholding is incorrect for two separate and independent reasons. First, because Appellants' urge that the electioneering communication prohibition directly targets genuine issue ads, such as WRTL's, it is now clear that the statute's application to genuine issue ads is substantial. *See id.* at 207-08. Second, even if the statute's overbreadth is still not substantial, the as-applied remedy has proven to be inadequate to protect the exercise of core First Amendment rights. This Court should therefore either render the as-applied remedy meaningful by creating a test fully protective of citizens' right to engage in genuine issue ads, or overturn *McConnell*'s facial upholding.

A. *Appellants Put McConnell at Issue.* Appellants themselves call into question *McConnell*'s facial upholding of the prohibition by insisting that WRTL's ads—which by any reasonable test are "genuine issue ads" like the gold-standard PBA Ad—are actually in the "*heartland*," FEC Br. at 18, 28, 36 n.9 (emphasis added), or "*core*," Intervenor's Br. at 16, 21, 31 (emphasis added), of what Congress intended to ban with the electioneering communication prohibition. If that claim by BCRA sponsors and the FEC is to be taken seriously, then the prohibition is facially unconstitutional. It is unconstitutional for specifically targeting constitutionally protected "genuine issue ads" with no strict-scrutiny justification and for seeking to silence criticism of the government by the people. "[A]n ordinance suspending unconditionally the right of assembly and free speech" cannot stand. *See Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971).

McConnell decided that the electioneering communication prohibition was not facially unconstitutional, i.e., it was not substantially overbroad. 540 U.S. at 207 (*citing Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), and *Virginia* v. *Hicks*, 539 U.S. 113 (2003)). The substantial overbreadth doctrine is to prevent chilling of protected speech, especially where, as here, there are criminal sanctions. *See, e.g., Hicks*, 539 U.S. at 119 (and collected cases). The doctrine was developed to assure that constitutionally protected speech would not go unprotected. *See id.* ("reduces . . . social costs caused by the withholding of protected speech"); *Broadrick*, 413 U.S. at 612 ("[I]t has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech by others may be muted . . . ."). The Court's facial upholding of the prohibition was premised on the belief that the prohibition's application to protected "genuine issue ads" would be rare. *See* 540 U.S. at 206-07.

As now revealed by Appellants' arguments, all of the assertions made by the FEC, the prime sponsors and the campaign finance reform lobby about how the prohibition is not overbroad for capturing too many "genuine issue ads" were themselves shams[74] because, under their present argument, there really are no "genuine issue ads" that mention candidates. In attacking as "sham" WRTL's ads, which are in all material ways like the Goldstein-endorsed PBA Ad, Appellants reveal that all along they intended to restrict "genuine issue ads." That, of course, is apparent from the litigation in this case and in *CCLM* (No. 06-589), in which the FEC and Intervenors have made no effort to assist the courts and the people by identifying

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[74]Although in *McConnell* Appellants argued percentages of genuine issue ads that were affected versus sham issue ads, the FEC now only mentions the word "sham" twice in its brief, neither time attempting to distinguish "genuine issue ads" from "sham" ads, FEC Br. at 17, 48 n.14, and the Intervenors' Brief never mentions the word "sham."

the characteristics of "genuine issue ads." Instead they have made every effort to prove that their own experts in *McConnell*, and this Court in *McConnell*, 540 U.S. at 206 n.88 (recognizing "genuine issue ads"), were wrong and "genuine issue ads" do not even exist.

Appellants attempt to justify the prohibition based on expert opinion that WRTL's ads might have some electoral effect. *See infra* at 19. But these experts thought that any communication during a prohibition period could influence an election, even if it didn't mention a candidate. *See infra* at 19-21. If that justification stands, then the prohibition is woefully underinclusive and, if not overturned on that basis, Congress could use this justification to expand the definition of electioneering communication to prohibit vast quantities of speech and activity. Appellants essentially make a circular argument, namely, that communications near elections affect elections so they may be regulated, and then, when confronted with the necessity of dealing with as-applied challenges for communications near elections, they fall back on the argument that, since these communications are near elections, they will affect elections and so there can be no exceptions.

In light of Appellants' new arguments, the *McConnell* Court's conclusion that application of the prohibition to genuine issue ads would not be "substantial, either in an absolute sense or relative to its application to election-related advertising," 540 U.S. at 207, is now unsupportable. "[W]here [a] statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Thus, concern for the chilling effect created by overbreadth should be greatest where—as Appellants have now admitted is the present case—the challenged statute is "aimed directly at activity protected by the Constitution." *See Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971). When a statute "'does not aim

specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of the freedom of speech,'" facial invalidation is appropriate. *New York v. Ferber*, 458 U.S. 747, 771 & n.26 (1982) (*quoting Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)).

B. *The As-Applied Remedy Is Inadequate.* The overbreadth doctrine assumes that, when a statute is upheld on its face, there is an effective remedy for protected speech in the form of as-applied challenges. This Court assumes that "whatever overbreadth may exist should be *cured* through case-by -case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-16 (emphasis added). Thus, the as applied remedy must be "*adequate* to assure that any overbreadth under the Law will be curable through case-by-case analysis of specific facts." *New York Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 15 (1988) (emphasis added).

But if an as-applied challenge is not "adequate," then "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Hicks*, 539 U.S. at 119 (citation omitted). The problems identified—considerable burden, risk of penalty, and risk of silence—all exist here to a degree that the as applied remedy does not cure the overbreadth.

The present case and *CCLM* (No. 06-589 in this Court) reveal this. In both *WRTL* and *CCLM*, preliminary injunctions were denied on the basis that neither group suffered any cognizable harm because there was always the PAC-option (although WRTL had insufficient PAC funds and CCLM had no PAC) or the corporation could simply avoid the "electioneering communication" definition altogether. JS App. 63(a)-

64(a), *Christian Civic League of Maine v. FEC*, 433 F. Supp.2d 81, 86 (D.D.C. 2006). The FEC fought expedition of CCLM's appeal. *CCLM* (No. 05-1447 in this Court) *FEC Opp. to Appellant's Mot. to Expedite and Consolidate Briefing*. Absent a preliminary injunction, the opportunity for expression and petition was forever lost. CCLM's case was then held moot by its district court. *Christian Civic League of Maine v. FEC*, No. 06-00614, 2006 WL 2792683 at *7 (D.D.C. Sept. 27, 2006). WRTL finally obtained recognition from its district court that its ads were constitutionally protected, but not in time to actually broadcast them. JS App. 29a. But the district court declined to state a general test to protect future ads, JS App. 22a-25a, so that this process must be gone through for each set of ads.

So any citizen group having the temerity to want to run future ads must (1) plan well in advance to allow ample litigation time (problematic because the need for grassroots lobbying frequently arises on short notice), (2) retain a lawyer, (3) endure the invasion of its privacy by a discovery investigation at the hands of the FEC and Intervenors (which often will include their political opponents), and (4) pay the legal expenses and costs to endure the scorched-earth litigation practices of the federally-funded FEC and the statutorily-permitted Intervenors in order to get prior permission from a court to run a constitutionally-protected communication at the core of our system of self-governance by the people.[75] After all that, they may still run into the dead-end of having their case mooted for lack of injunctive relief, as happened to CCLM. Groups like

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[75]Or, as the FEC suggests, FEC Br. at 24 n.6, a citizen group could just break the law and risk *criminal* penalties while still having to retain a lawyer, endure an investigation that ties up its people and resources for extended periods during the most crucial of times, reveal its otherwise private documents and inner workings, and pay vast sums to fight the FEC and well-funded Intervenors. *Contra Dombroski v. Pfister*, 380 U.S. 479, 486 (1965) ("The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded . . . .")

WRTL and CCLM have to work very hard to raise money for their ideological advocacy, and they do not have substantial funds for litigation. Because such cases would be against the FEC, citizen groups have no hope of recovering attorneys' fees and costs if they are a prevailing party. They must pay all of the costs of obtaining court permission to run a "genuine issue ad."

Thus, the proven pattern of opposition on the part of Appellants to as-applied challenges reveals that they will not be simple, quick, inexpensive little court visits whenever the need for grassroots lobbying suddenly arises and citizens need to act. Absent an adequate remedy to protect "genuine issue ads," the prohibition becomes like a burdensome prior restraint on core political speech.[76]

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[76]Prior restraint of speech, which is among "the most serious and the least tolerable infringements on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), "suppresses the precise freedom which the First Amendment sought to protect against abridgement," *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968), which "bear[s] a heavy presumption against its validity." *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980). Prior restraints are particularly lethal when they deprives core political speech of its practical value. *See Carroll* 393 U.S. at 180 ("It is vital to the operation of democratic government that the citizens have facts and idea on important issues before them. A delay or even a day or two may be of crucial importance in some instances."); *see also Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) ("[T]iming is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all. To require Shuttlesworth to submit his parade permit application months in advance would place a severe burden upon the exercise of his constitutionally protected rights."). Because the First Amendment's protection of political speech "has a structural role to play in securing and fostering our republican system of self-government," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring), a prior restraint's suppression of political speech, even if only temporary until the putative speaker prevails in litigation, is "seriously prejudicial to that system of government which the First Amendment, above all else, should be thought to undergird." John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 Yale L. J. 409, 433 (1983).

C. Absent Clear Protection for Grassroots Lobbying, McConnell's Facial Upholding Should Be Overturned. How may this problem be remedied? One option is to create a safe-harbor for grassroots lobbying, as proposed herein, that will eliminate the need for most future as-applied challenges. The other option is to overturn the facial upholding of the prohibition in light of the real-world experience in *WRTL* and *CCLM*, which have demonstrated that the as applied remedy for protecting genuine issue ads is inadequate. In light of the experience of these cases, WRTL believes that the better course is to overrule the prohibition, and it specifically requests a reversal. "Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). This case is well within this Court's standards for reversal.

This Court has provided standards for determining when it is appropriate to overrule precedent. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996). Stare decisis is a "principle of policy," not an "inexorable command." *Id.*; *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). The Court will overturn erroneous precedent. *Smith v. Allwright*, 321 U.S. 649, 665 (1944). Two primary rationales govern. First, "badly reasoned" or "unworkable" precedent will be overturned. *Seminole Tribe of Florida*, 517 U.S. at 63. *Accord Payne*, 501 U.S. at 827. Second, precedent is reversed if an essential factual assumption of the prior case was inaccurate or becomes inaccurate. *Vasquez*, 474 U.S. at 266. This Court applied these principles in *Lawrence v. Texas*. 539 U.S. 558 (2003). Justice Kennedy for the Court observed that stare decisis deserves respect but is not "an inexorable command." *Id.* at 577. He noted that the prior decision relied on an essential factual error. *Id.* at 571. Then he observed that it relied on

flawed legal reasoning. *Id.* at 577. Therefore, the Court held that it would not "remain binding precedent." *Id.* at 578.[77]

Consistent with the above guideline, the experience in this case and *CCLM* (No. 06-589) reveals that the assumption in *McConnell* that as-applied challenges would be an adequate remedy to protect genuine issue ads has proven inaccurate and unworkable. And while a few state legislatures have adopted electioneering communication prohibitions, they have viewed *McConnell* as a blank check to impose regulations that go well beyond those imposed by Federal law.[78] Therefore, there is clear justification for partially overturning *McConnell*.

CONCLUSION

For the reasons stated, this Court should (a) overturn the facial upholding of the prohibition in *McConnell* or (b) find the electioneering communication prohibition unconstitutional as

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[77] In the recent election-law case of *Randall v. Sorrell*, 126 S. Ct. 2479 (2006), the Court addressed the issue of stare decisis in relation to *Buckley v. Valeo*, 424 U.S. 1 (1976). Chief Justice Roberts and Justice Stevens concluded that *Buckley* should not be overturned because there was no subsequent change in the law, *id.* at 2489, there was no change in factual assumptions, *id.*, and state legislatures had relied on *Buckley*. *Id.* at 2490. Four concurring justices left open the possibility of overturning *Buckley*. *Id.* at 2501(Alito, J.) ("unnecessary to reach the issue"), 2501 (Kennedy, J.) (regulation "may cause more problems than it solves."), 2502 (Thomas and Scalia, JJ.) ("no bar to overturing *Buckley*").

[78] A number of states have adopted "electioneering communications," some of which reach *all* communications (not just broadcast), impose increased compliance burdens, and expand the time periods. *See* Alaska Stat. § 15.13.400(5); Ariz. Civ. Stat. Ann. § 16-901.01; Cal. Gov. Code § 85310; Colo. Const. Art. XXVIII, § 2(7); Conn. Gen. Stat. § 9-333c; Fl. Stat. § 106.011(18); Hi. Code R. § 11-207.6; Idaho Code Ann. § 67-6602(f); 10 Ill. Comp. Stat. 5/9-1.14; N.C. Gen. Stat. § 163-278.80(2); Okla. Stat. tit. 74, § 257:1-1-2; S.C. Code Ann. § 8-13-1300(31)(c); Vt. Stat. Ann., Titl 17 § 2891; Wash. Rev. Code § 42.17.020(20); W. Va. Code § 3-8-1A(10); *see also* Guam Code Ann. tit.3, § 19112.1.

applied to the three broadcast advertisements here, based on a clear and workable test which protects genuine issue ads generally. Alternatively, the prohibition should be declared unconstitutional as applied if made with disbursements from a segregated bank account as described in 2 U.S.C. § 434(f)(2)(E) (donations only from individuals).

Respectfully submitted,

James Bopp, Jr.,
Counsel of Record
Richard E. Coleson
Jeffrey P. Gallant
Racanna S. Moore
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
812/232-2434
812/235-3685 (facsimile)

M. Miller Baker
Michael S. Nadel
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, DC 20005
202/756-8000
202/756-8087 (facsimile)

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Nos. 06-969 and 06-970

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, APPELLANT

v.

WISCONSIN RIGHT TO LIFE, INC.

SENATOR JOHN MCCAIN, ET AL., APPELLANTS

v.

WISCONSIN RIGHT TO LIFE, INC.

ON APPEALS
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT FEDERAL ELECTION COMMISSION

THOMASENIA P. DUNCAN
Acting General Counsel

RICHARD B. BADER
Associate General Counsel

DAVID KOLKER
Assistant General Counsel

HARRY J. SUMMERS
KEVIN DEELEY
Attorneys
Federal Election Commission
Washington, D.C. 20463

PAUL D. CLEMENT
Solicitor General
Counsel of Record

GREGORY G. GARRE
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether this case is moot.

2. Whether the three-judge district court erred in holding that the federal statutory prohibition on a corporation's use of general treasury funds to finance "electioneering communications" is unconstitutional as applied to three broadcast advertisements that appellee proposed to run in 2004.

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In the Supreme Court of the United States

No. 06-969

FEDERAL ELECTION COMMISSION, APPELLANT

v.

WISCONSIN RIGHT TO LIFE, INC.

No. 06-970

SENATOR JOHN MCCAIN, ET AL., APPELLANTS

v.

WISCONSIN RIGHT TO LIFE, INC.

ON APPEALS
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT FEDERAL ELECTION COMMISSION

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-48a) is not yet reported.[1] Prior opinions of the district court (J.S. App. 55a-56a, 57a-71a) are unreported.

[1] Unless otherwise noted, references to "J.S. App." are to the appendix to the jurisdictional statement in No. 06-969.

JURISDICTION

The decision of the three-judge district court was issued on December 21, 2006. On December 28, 2006, the district court issued an order stating that the December 21 order was "a final appealable order as to those issues decided in the opinion accompanying that order," and that there was "no just reason to delay an appeal." J.S. App. 51a. Notices of appeal were filed on December 29, 2006, by the Federal Election Commission (J.S. App. 53a-54a) and by the intervenor defendants (appellants in No. 06-970) (06-970 J.S. App. 42a-43a). The jurisdictional statements were filed on January 12, 2007. On January 19, 2007, this Court consolidated the two appeals and set the case for briefing and argument, while postponing further consideration of the question of jurisdiction to the hearing of the case on the merits. The jurisdiction of this Court is invoked under the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114. As discussed below, while this Court has statutory jurisdiction to entertain the instant appeals, the district court lacked Article III jurisdiction to adjudicate appellee's claims because the controversy giving rise to this action is moot.

STATEMENT

This case concerns the constitutionality of Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91 (2 U.S.C. 441b(b)(2) (Supp. IV 2004)), which prohibits corporations, labor unions, and national banks from using their general treasury funds to pay for any "electioneering communication." The term "electioneering communication" is defined as a communication that refers to a candidate for federal office and is broadcast within the 30 days before a federal primary election or the 60 days before a federal general election in the jurisdiction in which that candidate is running. BCRA § 201(a), 116 Stat. 89 (2

U.S.C. 434(f)(3)(B)(i) (Supp. IV 2004). In *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003), this Court sustained the constitutionality of BCRA § 203 against a facial challenge.

Appellee filed suit in federal district court, arguing that BCRA's restrictions on the financing of "electioneering communications" are unconstitutional as applied to three broadcast advertisements that appellee had proposed to run in 2004. The three-judge district court concluded that appellee's claim was foreclosed by *McConnell* and accordingly dismissed the complaint. J.S. App. 55a-56a; see *id.* at 57a-71a. This Court reversed, clarifying that BCRA § 203 is subject to as-applied challenges. See *Wisconsin Right to Life, Inc.* v. *FEC*, 126 S. Ct. 1016, 1018 (2006) (*WRTL I*) (per curiam). On remand, the district court held by a divided decision that BCRA § 203 is unconstitutional as applied to the 2004 advertisements and granted summary judgment to appellee. J.S. App. 1a-48a.

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(d); 2 U.S.C. 438(a)(8) (Supp. IV 2004); and to issue written advisory opinions concerning the application of the FECA and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. a. Federal law has long prohibited all corporations from using their general treasury funds to finance contributions and expenditures in connection with federal elections. See *FEC* v. *Beaumont*, 539 U.S. 146, 152-154 (2003). The FECA makes it "unlawful * * * for any corporation what-

ever * * * to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). However, the FECA permits a corporation to establish a "separate segregated fund," commonly called a political action committee or PAC, to finance those disbursements. 2 U.S.C. 441b(b)(2)(C) (Supp. IV 2004). The fund "may be completely controlled" by the corporation, and it is "separate" from the corporation "'only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982) (quoting *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 414 (1972)). The fund may solicit and accept donations voluntarily made for political purposes by the corporation's stockholders or members and its employees, and the families of those individuals. 2 U.S.C. 441b(b)(4)(A)-(C). The money in a corporation's separate segregated fund can be contributed directly to candidates for federal office, and it may be used without limitation to pay for independent expenditures to communicate to the general public the corporation's views on such candidates.

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court held that Section 441b's prohibition on the use of corporate treasury funds to finance independent expenditures for campaign-related speech could not constitutionally be applied to a corporation that (1) was "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and [had a] policy not to accept contributions from such entities." *Id.* at 264; see *McConnell*, 540 U.S. at 210-211; 11 C.F.R. 114.10 (implementing the *MCFL* exception); see also *Beaumont*, 539 U.S. at 152-162 (upholding ban on direct corporate contributions as ap-

plied to all corporations, including those meeting the three *MCFL* criteria). Corporations possessing the characteristics identified in that case are commonly referred to as "*MCFL* organizations." See, *e.g.*, *McConnell*, 540 U.S. at 210.

The Court in *MCFL* also adopted a narrowing construction of 2 U.S.C. 441b even as applied to corporate entities that do not qualify as *MCFL* organizations. In interpreting Section 441b's prohibition of corporate "expenditure[s]," the Court noted that the FECA definition of "expenditure" encompassed "the provision of anything of value made 'for the purpose of influencing any election for Federal office.'" *MCFL*, 479 U.S. at 245-246 (quoting 2 U.S.C. 431(9)(A)(i)) (emphasis omitted). To avoid vagueness and overbreadth, the Court construed Section 441b's prohibition of independent expenditures from corporate treasuries to reach only the financing of communications that expressly advocate the election or defeat of a clearly identified candidate. *Id.* at 248-249; see 2 U.S.C. 431(17) (pre-BCRA law). The Court had previously introduced the concept of express advocacy in *Buckley* v. *Valeo*, 424 U.S. 1, 43-44, 77-80 (1976) (per curiam), when it narrowly construed other FECA provisions regulating independent campaign expenditures. *Buckley* provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n.52.

b. Based on its assessment of evolving federal campaign practices following numerous hearings, Congress subsequently determined that, "[w]hile the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *McConnell*, 540 U.S. at 126. In the wake of *Buckley*, corporations and labor unions crafted political communications that avoided the so-called magic words of electoral advocacy and financed those communications with "hundreds of millions of dollars" from their general treasur-

ies. *Id.* at 127. Indeed, even the advertisements aired by federal candidates themselves, who had no regulatory incentive to avoid the words of express advocacy, rarely included express exhortations to vote for or against a particular candidate. See *id.* at 127 & n.18, 193 & n.77. "[T]he conclusion that [corporate and union] ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *Id.* at 127.

"Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 194. BCRA § 203 amended 2 U.S.C. 441b(b) to bar any corporation, union, or national bank from paying for an "electioneering communication" with money from its general treasury. 2 U.S.C. 441b(b)(2) (Supp. IV 2004). The term "electioneering communication" is defined in pertinent part as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; (2) is made within 60 days before a general election, or within 30 days before a primary election for the office sought by the candidate; and (3) is "targeted to the relevant electorate." BCRA § 201(a), 116 Stat. 89 (2 U.S.C. 434(f)(3)(A)(i) (Supp. IV 2004)).[2] The prohibition on the use of corporate funds for electioneering communications does not apply to "*MCFL* organizations." See *McConnell*, 540

[2] BCRA excludes from the definition of "electioneering communication" "(i) a communication appearing in a news story, commentary, or editorial distributed through" a broadcasting station; (ii) a communication that is an expenditure or independent expenditure under the Federal Election Campaign Act; (iii) a candidate debate or forum; and (iv) any other communications the Commission exempts by regulation, consistent with certain requirements. BCRA § 201(a), 116 Stat. 89 (2 U.S.C. 434(f)(3)(B)(i)-(iv) (Supp. IV 2004)). The definition also does not encompass print communications such as billboards, newspaper and magazine advertisements, brochures, and handbills, and it does not cover telephone or internet communications. See *McConnell*, 540 U.S. at 207.

U.S. at 209-211. A corporation or union remains free, moreover, to establish a separate segregated fund and to pay for electioneering communications in unlimited amounts from that fund. See 2 U.S.C. 441b(b)(2)(C) (Supp. IV 2004).

3. Three Terms ago, in *McConnell*, this Court upheld against a facial constitutional challenge BCRA § 203's ban on the use of corporate or union treasury funds for electioneering communications. See 540 U.S. at 203-209. The Court observed that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view * * * [BCRA § 203] as a 'complete ban' on expression rather than a regulation." *Id.* at 204 (quoting *Beaumont*, 539 U.S. at 162); see *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990). "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *McConnell*, 540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 163). The Court also noted that its campaign-finance jurisprudence reflects "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (citation and internal quotation marks omitted).

The Court in *McConnell* further held that the compelling governmental interests that support the requirement that corporations finance express advocacy through a PAC apply equally to corporate financing of electioneering communications. 540 U.S. at 206. Based on its examination of a voluminous record, the Court concluded that the "vast majority" of prior advertisements encompassed by BCRA's definition of the term "electioneering communications" were intended to influence elections. *Ibid.* The Court further observed that, "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine

issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Ibid.*

4. a. Appellee Wisconsin Right To Life, Inc., is a nonprofit, nonstock Wisconsin corporation. J.S. App. 2a. Appellee's amended complaint in this case asserted that the corporation is tax-exempt under Section 501(c)(4) of the Internal Revenue Code of 1986 (26 U.S.C.), and that it was organized to protect "individual human life from the time of fertilization until natural death." Amended Compl. paras. 20, 22; see J.S. App. 57a. Appellee asserted that it does not qualify for any exception that would permit it to finance electioneering communications with corporate funds, alleging in particular that it is not a "qualified nonprofit corporation" under 11 C.F.R. 114.10, which implements the *MCFL* exception. See J.S. App. 3a n.2, 58a. In 2004, appellee raised more than $300,000—approximately one-fourth of the annual revenues of its general fund—from corporations, with the "vast majority" coming from business corporations. FEC Exh. 3, at 147-151; see J.A. 119-120. Appellee maintains a PAC for election-related activity. J.S. App. 58a.

b. United States Senator Russell Feingold of Wisconsin, a Democrat, ran for reelection in 2004. J.S. App. 58a. In both 1992 and 1998, appellee's PAC had made independent expenditures urging Senator Feingold's defeat. See FEC Exhs. 11-12. "In March 2004, [appellee's] PAC endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority." J.S. App. 58a. Later that month, appellee itself issued a press release that emphasized the organization's "resolve to do everything possible to win Wisconsin for President Bush and to send Russ Feingold packing!" J.A. 80. The lead story in the Spring 2004 issue of appellee's quarterly magazine was entitled "RADICALLY PRO-ABORTION FEINGOLD MUST GO!" (J.A. 101) and

stated that "Russ Feingold is so extreme in his anti-life position and the U.S. Senate is so important to the future of unborn babies that the defeat of Feingold must be uppermost in the minds of Wisconsin's pro-life community in the 2004 elections!" (J.A. 103). In August or September of 2004, appellee's PAC paid for radio advertising that called explicitly for Senator Feingold's defeat. See FEC Exh. 3, at 128-131; FEC Exh. 4, at 126-127.

Appellee, along with others acutely interested in the upcoming election, identified Senator Feingold's participation in filibusters of judicial nominees as a principal reason for opposing his reelection. The lead story in the Spring 2004 issue of appellee's magazine stated that "a number of President Bush's federal judicial nominees have been blocked by Bush's opponents from receiving a vote by the full Senate," and that "Feingold has been active in his opposition to Bush's judicial nominees and is expected to be particularly active in opposition to U.S. Supreme Court nominees." J.A. 101, 102. The lead story in the next issue was entitled "Nothing More Important: Re-Electing Pro-Life President Bush and Defeating Pro-Abortion Russ Feingold." J.A. 106. With respect to the Wisconsin Senate race, the story stated:

> The U.S. Senate is responsible for voting to confirm or reject the President's judicial nominees. One of Wisconsin's current U.S. Senators, pro-abortion Russ Feingold, faces re-election in the 2004 elections. Feingold has done everything he can to thwart a number of the President's federal judicial nominees at lower court levels and this is only a preview of what Feingold and others would do to defeat President Bush's nominees to the U.S. Supreme Court. The right-to-life community in Wisconsin must do all it can to defeat Feingold and replace him with an indi-

> vidual who will consider President Bush's judicial nominees in a fair manner.

J.A. 107. The article further explained that appellee's PAC had "endorsed three pro-life Republican U.S. Senate candidates," and that "all three candidates pledged to allow a vote by the full Senate on judicial nominees that have received either a favorable or neutral rating by the Senate Judiciary Committee." J.A. 108-109. In addition, the Republican Party of Wisconsin identified Senator Feingold's "obstruction of President Bush's judicial nominees" as one of four reasons "why Russ Feingold should be voted out of office." FEC Exh. 18, at 2; see J.A. 19.

c. "In a news release on July 14, 2004, [appellee] criticized Senator Feingold's record on Senate filibusters against judicial nominees." J.S. App. 58a; see J.A. 86-87. Less than two weeks later, near the beginning of a long congressional recess, appellee began to use its corporate treasury funds to finance the airing of two radio advertisements and one television advertisement that were critical of the filibusters. J.S. App. 3a-6a, 60a; see *id.* at 66a-71a (text of advertisements). Those advertisements characterized filibusters of judicial nominees as "politics at work, causing gridlock and backing up some of our courts to a state of emergency." *Id.* at 67a, 69a; see *id.* at 70a (television advertisement states that "[i]t's politics at work and it's causing gridlock"). Each advertisement stated: "Contact Senators Feingold and Kohl and tell them to oppose the filibuster." *Id.* at 67a, 69a, 70a-71a. Senator Kohl was not a candidate for reelection in 2004. *Id.* at 24a.

None of the advertisements provided contact information for Senator Feingold or Senator Kohl. Each advertisement, however, explicitly urged listeners or viewers to visit "BeFair.org," a website that appellee had created for its 2004 advertising campaigns. See J.S. App. 67a, 69a, 71a. That website contained links to appellee's main website, and both

sites contained numerous materials criticizing Senator Feingold on the filibuster issue. See, *e.g.*, J.A. 77-92, 100-109, 123-128. For example, one "e-alert" posted on "BeFair.org" stated that "16 out of 16 times over the past two years, Feingold and Kohl have voted to filibuster certain of the President's nominees," and that "Feingold and Kohl are putting politics into the court system, creating gridlock, and costing taxpayers money." J.A. 86. Between five and ten business corporations, some from outside Wisconsin, donated a total of more than $50,000 specifically to finance the advertisements. See FEC Exh. 3, at 143-145, 150.

The two radio advertisements first aired on July 26, 2004, and the television advertisement first aired on August 2, 2004. See FEC Exh. 3, at 65. The advertisements began to run a few days after four judicial filibuster votes had occurred and the Senate had departed for a six-week recess. See J.S. App. 43a (Roberts, J., dissenting); FEC Exh. 35, at 4; *Days in Session Calendars U.S. Senate—108th Congress 2nd Session* (2004) <http://thomas.loc.gov/home/ds/s1082.html>; J.A. 61. No judicial filibuster votes occurred during the rest of 2004. See FEC Exh. 35.[3]

5. On July 28, 2004, appellee filed suit against the FEC in federal district court, alleging that BCRA's prohibition on the use of corporate treasury funds for "electioneering communications" as defined in the Act is unconstitutional as applied to the three specific broadcast advertisements and to any "ma-

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[3] Evidence obtained through discovery in this case indicated that appellee had entered into discussions with an advertising agency in early to mid-May but had intended from the outset to air the advertisements during the BCRA pre-election period, even though the agency was generally capable of creating a radio advertisement in a week and a television advertisement in two weeks. See generally J.A. 24-31. That evidence also indicated that, in her initial contacts with the agency, appellee's executive director had stated that the advertising campaign would result in litigation. J.A. 26; FEC Exh. 5, at 41-43.

terially similar ads," which appellee described as "grass-roots lobbying," that appellee might seek to run in the future. J.S. App. 7a; Amended Compl. paras. 15-16. Appellee sought a preliminary injunction barring enforcement of the statute against it. J.S. App. 7a. Because Senator Feingold was a candidate for reelection in 2004, appellee "anticipate[d] that its ongoing advertisements [would] be considered electioneering communications for purposes of federal statutory and regulatory definitions * * * during the period between August 15, 2004 and November 2, 2004." *Id.* at 59a. A three-judge district court was convened pursuant to BCRA § 403(a)(1), 116 Stat. 114 (2 U.S.C. 437h note (Supp. IV 2004)).

The district court denied appellee's request for a preliminary injunction. J.S. App. 57a-71a. In holding that appellee had not established a substantial likelihood of success on the merits, the district court construed this Court's decision in *McConnell* to foreclose as-applied challenges of the sort brought by appellee in this case. *Id.* at 61a. The district court further stated that the specific facts of this case "suggest that [appellee's] advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id.* at 62a. The court explained:

> In *McConnell*, the Court voiced the suspicion of corporate funding of broadcast advertisements just before an election blackout season because such broadcast advertisements "will *often* convey [a] message of support or opposition" regarding candidates. Here, [appellee] and [appellee's] PAC used other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did [appellee] switch to broadcast media. This followed the PAC endorsing opponents seeking to unseat a candidate whom [appel-

> lee] names in its broadcast advertisement, and the PAC announcing as a priority "sending Feingold packing."

Id. at 62a-63a (citations omitted).

Senator Feingold was reelected in November 2004. Appellee "did not run any additional anti-filibustering ads after the 2004 election in either 2004 or in 2005 during the height of the controversy." J.S. App. 43a (Roberts, J., dissenting) (citation omitted); see FEC Exh. 3, at 101-103; J.A. 32-34. In May 2005, the district court dismissed appellee's complaint. J.S. App. 55a-56a.

6. In *WRTL I*, this Court vacated the judgment of the district court, stating that *McConnell* "did not purport to resolve future as-applied challenges" to BCRA § 203. 126 S. Ct. at 1018. The Court noted the district court's statement, in its opinion denying preliminary injunctive relief, that appellee's "advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Ibid.* The Court found it unclear, however, whether the district court had intended that statement as an alternative ground for its decision. *Ibid.* The Court remanded the case to the district court to consider the merits of appellee's as-applied challenge in the first instance. *Ibid.*

7. On remand, four Members of Congress were granted leave to intervene as defendants. J.S. App. 9a. By a divided vote, the three-judge district court subsequently entered summary judgment for appellee, holding that BCRA § 203 is unconstitutional as applied to the three advertisements that appellee had proposed to run during the 2004 election cycle. *Id.* at 1a-48a.[4]

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[4] In August 2006, appellee filed a motion for a preliminary injunction against enforcement of BCRA § 203 with respect to a new advertisement, unrelated to those at issue here, that appellee planned to run within the 60-day period before the 2006 general election. On September 7, 2006, the district court denied that motion. Appellee subsequently moved for summary judgment with

a. The district court began by considering its jurisdiction to address appellee's constitutional challenges. Specifically, the court held that appellee's as-applied challenge with respect to the 2004 advertisements remained justiciable because the challenge fell within the exception to mootness principles for claims that are "capable of repetition, yet evading review." J.S. App. 12a; see *id.* at 11a-15a. With regard to the "evading review" prong of that exception, the district court found it "entirely unreasonable, if not fanciful, to expect that [appellee] could have obtained complete judicial review of its claims in time for it to air its ads during the 30 and 60-day periods leading up to federal primary and general elections * * * in 2004." *Id.* at 13a. With respect to the "capable of repetition" prong, the district court concluded that, "[w]hile [appellee's] intention to run genuine issue advertisements during future BCRA blackout periods is not enough to sustain its generalized claim regarding 'grassroots lobbying advertisements,' it is enough to create a reasonable expectation that it will be subject to the same action again." *Id.* at 14a-15a (internal quotation marks omitted).

The district court held, however, that it lacked jurisdiction to consider appellee's "generalized lobbying claim" because that claim was "unripe." J.S. App. 16a. That claim "feature[d] a prophylactic challenge to what [appellee] anticipates to be the prohibition by the FEC of its broadcasting 'materially similar' ads in future election contests." *Id.* at 15a. The court held that this challenge was "too speculative and thus not sufficiently concrete to state a cognizable claim under Article III." *Id.* at 16a; see *id.* at 15a-16a.

b. On the merits, the district court stated that resolution of appellee's as-applied challenge required a "two-step analy-

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respect to the 2006 advertisement, and the FEC filed a motion under Federal Rule of Civil Procedure 56(f). Those motions remain pending in the district court. See J.S. App. 15a n.15.

sis of the ads in question." J.S. App. 17a. In the first step, the court sought to determine whether the 2004 advertisements were "express advocacy or its functional equivalent." *Ibid.* The court explained that, if the advertisements fit that characterization, "that would be the end of the challenge because [this] Court in *McConnell* upheld BCRA's authority to regulate [such advertisements]." *Ibid.*

In conducting the first step of its inquiry, the district court agreed with appellee that "the judicial assessment of the ads should be limited to a facial evaluation of the ads' language and images." J.S. App. 18a; see *id.* at 19a-22a. Accordingly, the court stated that it would

> limit its consideration to language within the four corners of the anti-filibuster ads that, at a minimum: (1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate.

Id. at 22a. Based on its analysis of those factors, see *id.* at 23a-24a, the district court concluded that, "on their face, [appellee's] 2004 anti-filibuster advertisements were not intended to influence the voters' decisions," *id.* at 24a (internal quotation marks omitted), and that the advertisements therefore were "not the functional equivalent of express advocacy," *id.* at 25a.

At the second step of its analysis, the district court considered whether the government had established a state interest sufficient to justify regulation of appellee's advertisements.

J.S. App. 25a-29a. The court stated that, "[b]y permitting as-applied challenges to section 203's constitutionality, * * * [this] Court has now put in play the question it left open in *McConnell* as to whether the government interests that justify regulating express advocacy and its functional equivalent also apply to the regulation of genuine issue ads." *Id.* at 26a-27a. The district court held that the interests supporting restrictions on corporate financing of express electoral advocacy are inapposite here. *Id.* at 27a-28a.

In explaining that conclusion, the district court stated that,

> while it may be theoretically possible to craft a genuine issue ad so subtly that it subconsciously encourages (or discourages) a potential voter to support a political candidate, there is no evidentiary or common sense basis to believe that such facially neutral ads are *necessarily* intended to affect an election, or will *necessarily* be viewed as such.

J.S. App. 27a-28a. The court also dismissed Congress's interest in establishing a "bright-line rule" for determining what qualifies as an "electioneering communication" subject to regulation under BCRA. *Id.* at 28a. Because the district court found no compelling government interest in regulating appellee's 2004 advertisements, the court declined to "address whether [appellee] could/ should have pursued other options for the financing of its advertisements or altered the content of its ads so as to avoid BCRA section 203's regulation altogether." *Id.* at 29a n.24.

c. Judge Roberts dissented from the district court's grant of partial summary judgment to appellee. J.S. App. 30a-48a. He found the court's refusal to look beyond the four corners of the 2004 advertisements to be inconsistent with this Court's decision in *McConnell* and with the district court's own rul-

ings at earlier stages of this case. See *id.* at 30a, 34a-40a. He explained that "[a] purpose and effect-based inquiry seems necessary to determine if [appellee's] ads are genuine issue ads or are instead express or sham issue advocacy because the 'presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.'" *Id.* at 36a-37a (quoting *McConnell*, 540 U.S. at 193). Judge Roberts concluded that, "[b]ecause a contextual analysis is warranted and discloses deep factual rifts between the parties concerning the purpose and intended effects of the ads, neither side is entitled to judgment as a matter of law." *Id.* at 30a. In particular, Judge Roberts stated that "[a] genuine issue of material fact exists as to whether [appellee's] 2004 advertisements were intended to influence a Senate election, or to spark litigation, or to be genuine issue ads." *Id.* at 47a.

d. On December 28, 2006, on the FEC's motion, the district court clarified that its December 21 order was "a final appealable order as to those issues decided in the [accompanying] opinion," and that the court found "no just reason to delay an appeal." J.S. App. 51a; see Fed. R. Civ. P. 54(b); BCRA § 403(a)(3), 116 Stat. 114 (2 U.S.C. 437h note (Supp. IV 2004)).

SUMMARY OF ARGUMENT

The district court erred in holding BCRA § 203 unconstitutional as applied to the three advertisements at issue here.

I. Appellee's as-applied constitutional challenge, which involves advertisements that it has no continuing intent to broadcast, is moot. Appellee has failed to establish or even allege that it will again seek to finance, during one of the pre-election periods covered by BCRA § 203, either the specific advertisements at issue in this case or other advertisements having the same combination of features that the district court found decisive. The "capable of repetition, yet evading

review" exception does not render this "moot" controversy justiciable because appellee has failed to show that the "same controversy" is likely to recur. In particular, appellee has failed to show that it is likely to run future advertisements having the five characteristics that the district court found dispositive in disposing of appellee's as-applied claim.

II. BCRA § 203 is constitutional as applied to the three advertisements at issue in this case. Whatever the ultimate scope of as-applied challenges permitted to Congress's bright-line rule in BCRA § 203, the advertisements at issue in this case fall comfortably within the heartland of "electioneering communications" that Congress may permissibly regulate under this Court's precedents. Particularly when viewed in context, the advertisements are the functional equivalent of the sort of express advocacy that this Court has long recognized may be constitutionally regulated under FECA and its separate-segregated-fund provision.

A. The district court erred by positing the existence of a sharp distinction between issue advocacy and electioneering in the immediate runup to an election. This Court has repeatedly recognized that no such clear divide exists, and that discussion of issues of public importance is often intertwined with advocacy of electoral outcomes, especially as the election approaches. The fact that appellee's advertisements took the form of appeals to listeners and viewers to contact their elected representatives (and to visit a website attacking a federal candidate) provides no basis for sustaining appellee's as-applied challenge. To the contrary, advertisements taking that form were the principal abuse at which BCRA's "electioneering communications" provisions were directed.

B. In holding BCRA § 203 unconstitutional as applied to appellee's advertisements, the district court relied in part on its perception that the advertisements did not "necessarily" have an electoral purpose or effect. This Court has already

held, however, that BCRA § 203 is constitutional on its face, and it was appellee's responsibility to demonstrate that the generalization on which that provision is based does *not* hold true here. That allocation of burdens is consistent with this Court's prior decisions adjudicating as-applied challenges to facially valid provisions of the campaign-finance laws. Placing the burden of proof on appellee is especially appropriate in the present context because BCRA § 203 leaves ample alternatives open to corporate advertisers who do not in fact seek to influence federal elections.

C. The district court erred in purporting to limit its inquiry to the "four corners" of the 2004 advertisements and in refusing to consider important extrinsic evidence that reinforced the inference of electioneering intent. The court stated that consideration of such evidence would render the constitutional inquiry unworkable and would deprive regulated parties of clear guidance concerning the applicable law. As BCRA's definition of "electioneering communication" itself demonstrates, however, the district court's analysis is flawed because it assumes a false dichotomy between an exclusive focus on an advertisement's text and an entirely unstructured examination of all potentially relevant circumstances. The court's stated objectives of improving administrability and providing clear guidance to advertisers are understandable, but they are appropriately served by adhering as closely as possible to the bright-line rule drawn by Congress and by minimizing the circumstances in which as-applied challenges require the courts to depart from that rule.

The district court's refusal to consider certain communications critical of Senator Feingold that were posted on appellee's "BeFair.org" website was especially misguided, since the broadcast advertisements at issue here explicitly exhorted listeners and viewers to visit that website. Even if it were appropriate to limit the as-applied inquiry to textual indicia,

a corporation surely cannot claim a constitutional right to engage in "issue" advocacy when its advertisements expressly reference a website that presents overt attacks on a candidate who is named in the advertisements and is facing reelection in the same window of time that the advertisements run.

BCRA's definition of "electioneering communication," which is restricted to broadcast advertisements aired within the 30- and 60-day periods preceding federal primary and general elections, reflects Congress's understanding that the timing of an advertisement that mentions a federal candidate is important evidence of electoral purpose and effect. The Court in *McConnell* recognized the accuracy of that generalization. The timing of appellee's broadcast advertisements strongly reinforced the inference that those advertisements were intended to influence the Wisconsin Senate election and would likely have that effect. Appellee commenced its advertising campaign at a time when Congress was out of session, and it abandoned its efforts after the election occurred, even though public controversy over the "issue" on which appellee claimed to be advocating—filibustering of judicial nominees—reached its height during the spring of 2005.

The district court also erred in refusing to consider evidence of other, contemporaneous communications in which appellee opposed Senator Feingold's reelection and specifically criticized his record on the issue of judicial filibusters. Although those communications were not themselves subject to BCRA's "electioneering communications" provisions, they reinforced the inference that the broadcast advertisements had an electioneering purpose. Adoption of the district court's view that such communications are irrelevant to the constitutional inquiry would create an artificial analysis in which directly relevant evidence is disregarded, not to mention substantial opportunities for circumvention of BCRA's financing restrictions on corporate electioneering.

ARGUMENT

I. APPELLEE'S AS-APPLIED CONSTITUTIONAL CHALLENGE WITH RESPECT TO ITS 2004 ADVERTISEMENTS IS MOOT

A. "The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins * * * [this Court's] mootness jurisprudence." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain [this Court's] jurisdiction * * * it is not enough that a dispute was very much alive when suit was filed." *Id.* at 477-478.

Even after the 2004 Wisconsin Senate election, when appellee could lawfully have spent its treasury funds to air the three advertisements at issue here, appellee declined to do so. Appellee does not assert any continuing interest in running those advertisements, nor does it identify any reason to believe that a significant dispute over Senate filibusters of judicial nominees will occur in the foreseeable future. And because appellee chose not to run its advertisements during the electioneering communications periods preceding the 2004 Wisconsin Senate election, it cannot be subject to any future Commission enforcement action whose validity might turn on whether BCRA's financing restrictions are constitutional as applied to those advertisements. Because no live controversy exists with respect to the three advertisements appellee proposed to broadcast during 2004, appellee's claims with respect to those advertisements are moot and no longer suitable for

judicial resolution. Compare *Christian Civic League of Maine, Inc.* v. *FEC*, No. 06-cv-0614 (D.D.C. Sept. 27, 2006), juris. statement pending, No. 06-589 (filed Oct. 26, 2006).[5]

B. This Court has recognized an exception to mootness principles for situations that are "capable of repetition, yet evading review." See *Southern Pac. Terminal Co.* v. *ICC*,

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[5] This Court has statutory jurisdiction over the instant appeals. The three-judge district court granted appellee's motion for summary judgment with respect to the three specific advertisements that appellee had proposed to run in 2004, see J.S. App. 16a-29a, while holding that appellee's claim for relief with respect to unspecified "materially similar grass-roots lobbying ads" was unripe because it was "too speculative and thus not sufficiently concrete to state a cognizable claim under Article III" of the Constitution, *id.* at 16a. The district court has not yet resolved appellee's as-applied challenge with respect to a new advertisement that appellee planned to run within the 60-day period before the 2006 general election. See note 4, *supra*. The court has clarified, however, that its December 21 order was a "final appealable order as to those issues decided in the [accompanying] opinion," and that the court found "no just reason to delay an appeal." J.S. App. 51a.

BCRA § 403(a)(3) states that a "final decision" of a three-judge district court in a suit challenging the constitutionality of any BCRA provision "shall be reviewable only by appeal directly to" this Court. 116 Stat. 114 (2 U.S.C. 437h note (Supp. IV 2004)). Because BCRA does not define the term "final decision," the term should be given the same meaning that it has in 28 U.S.C. 1291, which defines the jurisdiction of the courts of appeals. Although compliance with the "final decision" requirement of Section 1291 usually requires entry of an order that terminates the entire case, the district court in a suit involving multiple claims or multiple parties "may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment." Fed. R. Civ. P. 54(b); see, *e.g.*, *Curtiss-Wright Corp.* v. *General Elec. Co.*, 446 U.S. 1, 7-8 (1980); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 438 (1956) (explaining that Rule 54(b) "scrupulously recognizes the statutory requirement of a 'final decision' under § 1291" and "administers that requirement in a practical manner in multiple claims actions"); *id.* at 432-438. Because the district court certified its summary-judgment ruling as final in accordance with Rule 54(b), this Court is vested with exclusive appellate jurisdiction over the instant appeals.

219 U.S. 498, 515 (1911). "[T]he capable-of-repetition doctrine applies only in exceptional situations," *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983), "where the following two circumstances [are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again," *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998) (citations and internal quotation marks omitted) (quoting *Lewis*, 494 U.S. at 481). For an alleged wrong to be considered "capable of repetition," "there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)). Accord, *e.g.*, *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 774 (1978).

As the district court recognized, see J.S. App. 14a-15a, the mootness inquiry cannot be conducted wholly in isolation from a court's understanding of the legal regime that would govern its disposition of the lawsuit on the merits. In order to demonstrate a probability that it will again become involved in the "same controversy," *Murphy*, 455 U.S. at 482, a plaintiff need not establish that the precise facts of the case before the court are likely to be replicated, but it must demonstrate that its future plans will generate essentially the same controversy. In the present context, appellee must show that (1) it is likely to run future advertisements during BCRA pre-election periods, (2) those advertisements will fall within the BCRA definition of "electioneering communication," and (3) those advertisements will share the characteristics that the district court deemed legally relevant to the disposition of appellee's as-applied challenge. Cf. *Lewis*, 494 U.S. at 481.

The district court found that appellee's generalized statement of intent to finance "genuine issue advertisements dur-

ing future BCRA blackout periods" was "enough to create a 'reasonable expectation' that [appellee] 'will be subject to the same action again.'" J.S. App. 15a. But an intent to run advertisements that involved express advocacy, or advertisements that even appellee conceded would amount to its functional equivalent, would not generate the "same controversy" as this case. And, as particularly relevant in light of the district court's merits ruling, the district court did not find, and appellee has identified no basis for concluding, that appellee will again seek to finance pre-election advertisements sharing the five characteristics, see *id.* at 22a, that the district court found dispositive in sustaining appellee's as-applied challenge. Absent such a finding, appellee cannot show that it will likely be a party to the "same controversy" in the future, and the instant suit is not "capable of repetition" within the meaning of this Court's precedents. Cf. *McConnell* v. *FEC*, 540 U.S. 93, 225-226 (2003).[6]

C. The district court also cited a number of cases in which various "election-related challenges" were held to be "capable of repetition, yet evading review." J.S. App. 12a. The court's reliance on those decisions was misplaced. When a plaintiff demonstrates an intent to participate in *electoral processes* on an ongoing basis, a court may have reasonable grounds for

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[6] Even if a substantially similar controversy were to recur in the future, appellee's as-applied challenge would not necessarily evade review. Even the massive litigation in *McConnell* took less than 21 months from the time complaints were filed until a final decision by this Court. There is no reason to assume that the time between the filing of a far simpler suit like this one and the occurrence of an election would be "always so short as to evade review." *Spencer*, 523 U.S. at 18. Principles of expeditiousness would presumably allow a suit to be brought well in advance of the BCRA pre-election time periods, and even if such pre-enforcement, as-applied challenges cannot be fully litigated, the same issues can be fully litigated in the more traditional as-applied context, *viz.*, enforcement actions. There is consequently no structural impediment in this setting to full judicial review of the relevant issues.

concluding that any injury the plaintiff suffers during one election will be repeated during later electoral cycles. The gravamen of appellee's as-applied challenge, by contrast, is that the temporal overlap between its lobbying plans and the 2004 Wisconsin Senate campaign was simply fortuitous, and that its purported issue advocacy has been unconstitutionally restricted even though it *lacks* the intent to influence federal elections. Appellee's claim that it will again be involved in the "same controversy" thus rests not on a continuing interest in electoral participation, but on a prediction that similar coincidences will arise in the future. In light of appellee's disavowal of any intent to engage in electoral advocacy, there is no sound reason to conclude on the record before this Court that appellee will again wish to finance, during the relatively brief pre-election periods covered by BCRA § 203, advertisements having the particular characteristics that the district court found legally dispositive.

Because appellee's claims are moot, this Court should order that the district court's judgment and decision on the claims at issue be vacated and appellee's suit dismissed. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

II. BCRA § 203 IS CONSTITUTIONAL AS APPLIED TO THE THREE ADVERTISEMENTS AT ISSUE IN THIS CASE

In addressing appellee's as-applied challenge in this case, the district court stated that it would

> limit its consideration to language within the four corners of the anti-filibuster ads that, at a minimum: (1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of legislative scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described is-

> sue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate.

J.S. App. 22a. Although the district court did not specify precisely how those factors should be balanced, the court evidently concluded that, at least if each of the five enumerated considerations suggests a lack of electioneering intent—*i.e.*, if a particular advertisement possesses characteristic (1) and does not possess characteristics (2)-(5)—then BCRA § 203's financing restrictions are unconstitutional as applied to that advertisement. See *id.* at 23a-24a.

The district court construed this Court's remand order in *WRTL I* as a "tacit acknowledgment that, notwithstanding the virtues of a bright-line test, there may nonetheless be some ads that are unconstitutionally captured by BCRA section 203." J.S. App. 28a. The court cited (*ibid.*) this Court's decision in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), which held FECA's ban on corporate electoral spending unconstitutional as applied to a defined class of corporate entities. See p. 4, *supra*. The decision in *MCFL* is indeed instructive with respect to the proper mode of analyzing as-applied challenges to BCRA § 203, but it does not support the approach taken by the district court.

The Court in *MCFL* explained that the rationale for prohibiting corporate independent expenditures in support of federal candidates "does not extend uniformly to all corporations," and that "[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status." 479 U.S. at 263. The Court stated that "MCFL has three features essential to [the Court's] holding that it may not constitutionally be bound by § 441b's restriction on independent spending." *Id.* at 263-264; see *id.* at 264 (describing three essential

characteristics); p. 4, *supra*. Based on the presence of those factors, the court specifically rejected the hypothesis that "MCFL merely poses less of a threat of the danger that has prompted regulation," in which case the Court noted that it would "not second-guess a decision to sweep within a broad prohibition activities that differ in degree, but not in kind." 479 U.S. at 263. The Court concluded instead that MCFL "does not pose such a threat at all." *Ibid.*; see *id.* at 264 (stating that the identified characteristics "ensure[d]" that MCFL's electoral spending would not implicate the concerns at which the general ban is directed). The constitutional exemption recognized in *MCFL* is thus easily administrable (since it focuses on the nature of the corporation rather than on an examination of the text or content of particular advertisements, and corporations having the essential characteristics can readily be identified), and it applies only to corporations that *assuredly* do not pose the danger at which the general statutory ban is directed at all, rather than trying to discern differences of degree.

In order to succeed in its as-applied constitutional challenge, appellee should similarly be required to articulate a legal test that satisfies the same criteria—or, to put it another way, a test that avoids the pitfalls of both undue complexity *and* susceptibility to evasion. The district court's five-factor test does not satisfy those criteria. The district court correctly recognized that an approach that required examination of *all* facts that are potentially relevant to the ascertainment of an advertisement's purpose or effect could not feasibly be administered, especially under the time constraints of expedited pre-election litigation. Moreover, to the extent that such an approach involved close parsing of the nuances of an advertisement's text, it would disserve First Amendment values. However, in attempting to minimize those problems, the district court confined its inquiry to an artificially truncated

set of facts, articulated a test that identifies only those advertisements that are *most obviously* election-related, and effectively held BCRA § 203 unconstitutional as applied to all other "electioneering communications." Acceptance of that approach would be inconsistent with this Court's holding in *McConnell* that BCRA § 203 is facially constitutional, would facilitate easy circumvention of BCRA § 203, and would reintroduce the difficulties of enforcement that formerly existed under the "express advocacy" test.

The district court's analysis reflects at least three critical errors. First, the court posited the existence of an unrealistically sharp distinction between issue advocacy and electioneering, notwithstanding the recognition of both Congress and this Court that the two substantially overlap. Second, the court improperly placed upon the government the burden of establishing that the three advertisements implicate the concerns that BCRA § 203 is intended to address, rather than requiring appellee to demonstrate its constitutional entitlement to an exemption from a facially valid law. Third, the court erroneously refused to consider highly probative contextual evidence, which substantially reinforced the inference that appellee's advertisements were intended to influence the 2004 Wisconsin Senate election and were likely to have that effect. As a consequence of those errors, the district court held BCRA § 203 unconstitutional as applied to advertisements that, when fairly considered, are in the heartland of the advertisements that Congress intended to and did reach in BCRA § 203, and indeed are the functional equivalent of the express advocacy that the Court has long held can be regulated by FECA and its separate-segregated-fund provision.[7]

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[7] In *McConnell*, this Court stated that, "to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy," the governmental interests that supported financing restrictions on express

A. Congress And This Court Have Recognized That Advertisements Urging Citizens To Contact Their Elected Representatives Are Often Intended To Influence Federal Elections And Will Frequently Have That Effect

The district court's analysis assumes the existence of a clear divide between electoral advocacy and "genuine issue-advertisements." See J.S. App. 16a-17a, 26a-28a. Confining its inquiry to the four corners of appellee's 2004 advertisements, the district court observed that "the language in [appellee's] advertisements does not mention an election, a candidacy, or a political party, nor do they comment on a candidate's character, actions, or fitness for office." *Id.* at 23a. The court concluded that, "on their face, [appellee's] three 2004 anti-filibuster advertisements were not intended to influence the voters' decisions." *Id.* at 24a (internal quotation marks omitted).

That analysis cannot be squared with this Court's precedents and essentially ignores the fundamental dynamic that Congress recognized in BCRA and the Court acknowledged

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advocacy apply equally to "electioneering communications." 540 U.S. at 206; see *id.* at 205-206. In the instant case, the district court framed the relevant question as "whether [appellee's] 2004 anti-filibuster ads are express advocacy or its functional equivalent," J.S. App. 22a, and concluded that they are not, see *id.* at 22a-25a. In the context of the *McConnell* opinion as a whole, however, the Court appears to have used the phrase "functional equivalent" to encompass *all* advertisements naming a federal candidate that are intended to influence elections or are likely to have that effect. To the extent the district court construed that phrase as limited to a subset of advertisements that are *most obviously* election-related, the court erred in concluding that BCRA § 203 may constitutionally be applied only to such advertisements. More broadly, while functional equivalence may have been a useful concept in upholding the bright-line limitations of BCRA § 203, the Court in no way suggested that functional equivalence or its absence was itself a workable or administrable standard to identify advertisements that would give rise to a viable as-applied challenge.

in *McConnell*. More than 30 years ago, the Court observed that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley* v. *Valeo*, 424 U.S. 1, 42 (1976) (per curiam). In *McConnell*, the Court quoted, as an accurate (and colorful) description of this reality, the statement of a National Rifle Association (NRA) official that "[w]hat separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." 540 U.S. at 126 n.16; see *id.* at 327 (Kennedy, J., dissenting).

This Court has also long recognized the infeasibility of determining, on an ad hoc, case-by-case basis, whether particular advertisements discussing issues of public concern are actually intended to influence federal elections. The Court initially sought to obviate the need for such difficult inquiries by construing federal restrictions on electioneering to apply only to communications that expressly advocated an electoral result. See *Buckley*, 424 U.S. at 43, 80; *MCFL*, 479 U.S. at 248-249. When the inadequacy of that test became apparent to all, Congress crafted the BCRA definition of "electioneering communication" and prohibited the use of corporate treasury funds to finance "electioneering communication[s]" as so defined. See *McConnell*, 540 U.S. at 126-129, 193-194; pp. 5-6, *supra*. That definition represents Congress's considered effort, based on the substantial experience of its Members as participants in the political process and on evidence obtained through numerous hearings on the matter, to identify through clear, objective, and easily applied criteria—criteria that do not require courts to make judgment calls based on fine parsing of the nuances of an advertisement's text—a class of communications that are generally intended to influence electoral outcomes and are likely to have that effect.

BCRA's definition of "electioneering communication" encompasses advertisements that urge viewers or listeners to contact an identified Member of Congress concerning an issue of public importance, provided that the advertisement is targeted to the relevant electorate and is aired during the 30- or 60-day period before a primary or general election in which that legislator is a candidate. That clear and administrable test was deemed necessary to target the *principal* means by which the pre-BCRA restrictions on corporate electoral advocacy were evaded. The record in *McConnell* made that clear. See, *e.g.*, *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 304 (D.D.C. 2003) (Henderson, J.); *id.* at 532-536 (Kollar-Kotelly, J.); *id.* at 875-879 (Leon, J.). In discussing the sorts of pre-BCRA advertisements that were intended to influence federal elections but avoided words of express advocacy, the Court in *McConnell* observed that "[l]ittle difference existed * * * between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-127. The Court thus treated an appeal to citizens to contact their elected representative, when targeted to the relevant electorate and issued during the 30- and 60-day periods preceding federal primary and general elections, as a *paradigmatic* example of the advertisements that BCRA's "electioneering communication" provisions were intended to address.

Expert testimony introduced by the FEC in this case is to the same effect. The declaration of veteran political consultant Douglas L. Bailey stated:

> A purported issue ad that airs in the time immediately preceding an election that implores a voter to "contact" or "tell" a candidate about one's opposition to a certain policy will unavoidably affect that candidate's election. During the election time period, the implicit message to the voter

> is that one way to change the policy would be to remove that candidate from office on election day. Conversely, an issue ad which airs during the pre-election period and implores a voter to contact or tell a candidate about one's support for a particular policy, implicitly suggests that one way to continue that policy is to vote for the reference[d] candidate.

J.A. 57.[8] The declarant also explained that "[a] true *issue* ad campaign is most effective when it is aired *outside* of the time period immediately before an election, when its message—even if the message refers to an officeholder—will not be received as another variety of candidate campaign ad." J.A. 56 (emphasis added).

In *McConnell*, this Court found that, of the pre-BCRA "issue ads that clearly identified a candidate and were aired during [the 30- and 60-day] preelection timespans," the "vast majority of ads clearly had [an electioneering] purpose." 540 U.S. at 206. The fact that appellee's advertisements took the form of appeals to citizens to contact their elected representatives on an issue of public importance provides no basis for regarding those advertisements as exceptions to the general rule. To the contrary, advertisements taking that form were the *principal focus* of Congress's concern when it crafted BCRA's "electioneering communication" provisions.

B. Appellee Bears The Burden Of Establishing Its Entitlement To A Constitutional Exemption From A Facially Valid Law

Appellee's 2004 advertisements differed in one respect from such pre-BCRA advertisements as the "Jane Doe" hypo-

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[8] In *McConnell*, Mr. Bailey's testimony was cited with apparent approval by this Court, see 540 U.S. at 193 n.77, and by each of the three members of the district court, see 251 F. Supp. 2d at 305 (Henderson, J.); *id.* at 528-529 (Kollar-Kotelly, J.); *id.* at 874, 880 (Leon, J.)

thetical described in *McConnell*. That hypothetical advertisement "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 127. Appellee's advertisements, by contrast, contained no direct criticism of Senator Feingold's record on the issue of judicial filibusters (although, as explained below, they specifically exhorted listeners to visit a website that *did* criticize Senator Feingold's record on the filibusters). See J.S. App. 18a.

The district court did not assert, however, let alone identify any evidentiary basis for concluding, that the absence of any direct references to Senator Feingold's voting record in the 2004 advertisements dispelled any possible inference of electioneering purpose or effect. To the contrary, the court acknowledged that "it may be theoretically possible to craft" such an advertisement "so subtly that it subconsciously encourages (or discourages) a potential voter to support a political candidate." J.S. App. 27a. (One easy way to craft such advertisements without the need for subtlety is to urge listeners or viewers to visit a website that directly attacks the candidate.) The court found, however, that "there is no evidentiary or common sense basis to believe that such facially neutral ads are *necessarily* intended to affect an election, or will *necessarily* be viewed as such." *Id.* at 27a-28a. The court concluded on that basis that BCRA § 203 is unconstitutional as applied to those advertisements.

Contrary to the district court's suggestion, it was not *the government's* burden to prove, in this as-applied challenge, that the generalization on which BCRA's "electioneering communication" provisions are based "necessarily" holds true in this case. The Court in *McConnell* upheld BCRA § 203 against a facial constitutional challenge, see 540 U.S. at 203-209, and it recognized that the "vast majority" of pre-BCRA advertisements "that clearly identified a candidate and were

aired during [the 30- and 60-day] preelection timespans" had an electioneering purpose, *id.* at 206. The Court also recognized that the ease with which corporations could avoid BCRA's limitations prospectively, by addressing the issue of concern without explicitly linking the issue to a candidate, meant that going forward even fewer instances in which the corporation insisted on linking a candidate to an issue would not involve an electioneering purpose. See *ibid.* In claiming a constitutional entitlement to an exemption from BCRA § 203's financing restrictions, *appellee* assumed the burden of demonstrating (at least) that the generalization reflected in BCRA's definition of "electioneering communication" does *not* hold true here.

That allocation of burdens is consistent not only with the customary presumption that Acts of Congress are constitutional (which applies with particular force to statutes already upheld on their face by this Court), but also with prior decisions of this Court that have sustained as-applied challenges to other provisions of the campaign-finance laws. In *Buckley*, for example, the Court held that the FECA's disclosure provisions are constitutional on their face and as applied to minor parties generally. See 424 U.S. at 64-74. The Court noted, however, that a particular minor party could establish a meritorious as-applied constitutional challenge by demonstrating "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals." *Id.* at 74. When the Court later addressed such an as-applied challenge in *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982), it followed *Buckley* and based its decision on the party's "proof of specific incidents of private and government hostility toward the [minor party] and its members." *Id.* at 99.

The Court in *MCFL* employed a similar mode of analysis. The defendant corporation in that case argued that the

FECA's prohibition on the use of corporate treasury funds to finance express electoral advocacy, 2 U.S.C. 441b, was unconstitutional as applied to the defendant's own campaign-related expenditures. Although the Court ruled in the corporation's favor, the Court did not suggest that *the government* bore the burden of proving that MCFL's campaign spending would actually cause the problems at which the statutory ban is directed. To the contrary, the Court stated that it would "not second-guess a decision to sweep within a broad prohibition activities that differ in degree, but not in kind." 479 U.S. at 263. The Court held the statute unconstitutional as applied only after concluding that the corporation's expenditures would *not* cause those problems—*i.e.*, that "the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL." *Ibid.* The Court explained that "[i]t is not the case * * * that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all." *Ibid.*; see *id.* at 264 (identifying specific attributes of MCFL that "ensure[d]" that the organization's election-related spending would not implicate the policy rationales underlying the FECA ban on corporate campaign expenditures); *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 210 (1982); pp. 26-27, *supra*.

Placing the burden of proof on the party seeking a constitutional exemption from a facially valid law is especially appropriate in the present context because BCRA § 203 imposes relatively minor burdens on corporate speakers who do not seek to influence federal elections. As the Court in *McConnell* observed, "corporations and unions may finance genuine issue ads during [pre-election] timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U.S. at 206. Thus, even if a particular corporation actually lacks the intent to influence federal elections, it will suf-

fer no substantial impairment of its ability to engage in issue advocacy—it will simply be required to use a separate segregated fund to pay for the advertisements.[9] Alternatively, appellee could have financed the advertisements with general treasury funds if it had omitted any reference to Senator Feingold. And of course other media remain unaffected by BCRA § 203. The district court erred in refusing to take those alternatives into account in conducting its constitutional analysis. See J.S. App. 29a n.24.

C. The District Court Erroneously Refused To Consider Highly Relevant Evidence Confirming That Appellee's Advertisements Were Intended To Affect The Wisconsin Senate Election And Could Be Expected To Have That Effect

As Judge Roberts explained in dissent, see J.S. App. 41a-45a, a substantial body of evidence outside the text of the 2004 advertisements—including materials directly referenced in those advertisements—suggests that the advertisements were intended at least in part to affect the Senate election and could be expected to have that effect. Indeed, when it denied appellee's request for a preliminary injunction, the district court had previously relied on that evidence in concluding that appellee's 2004 advertisements "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id.* at 62a; see *id.* at 38a-39a & n.7 (Roberts, J.,

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[9] Appellee could also have chosen to structure itself as an *MCFL* organization, see p. 4, *supra*, which would have allowed it to finance electioneering communications with general treasury funds, see *McConnell*, 540 U.S. at 209-211. Appellee chose instead (1) to accept substantial contributions from business corporations, both in general and to finance the specific advertisements at issue here, see pp. 8, 11, *supra*; and (2) to fund the advertisements at issue through general treasury funds rather than through a PAC. As a result, it placed itself squarely within the heartland of the concerns that BCRA § 203 is intended to address.

dissenting). In granting appellee's later motion for summary judgment, however, the court stated that it would "limit its consideration to language within the four corners of the anti-filibuster ads." *Id.* at 22a; see *id.* at 19a-22a.[10] The court relied in part on the practical concern that "as-applied challenges, to be effective, must be conducted during the expedited circumstances of the closing days of a campaign when litigating contextual framework issues and expert testimony analysis is simply not workable." *Id.* at 19a. The court also stated that "delving into a speaker's subjective intent is both dangerous and undesirable when First Amendment freedoms are at stake." *Id.* at 20a.

The district court's concern about the administrability of an "as-applied" standard that was not limited to the text of the advertisements is understandable in light of Congress's effort to establish a bright-line rule to avoid inquiries into

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[10] Although the district court stated that it would limit its inquiry to the "four corners" of the advertisements, it did not actually do so. One of the factors that the court specifically identified as relevant to its constitutional analysis was whether appellee's advertisements "describe[d] a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future." J.S. App. 22a. Determining whether Senate filibusters of judicial nominees were the subject of current or imminent "legislative scrutiny" at the time appellee sought to run its advertisements necessarily required examination of facts outside the "four corners" of the advertisements. See pp. 45-47, *infra*. In addition, as Judge Roberts explained in dissent, the structure of the advertisements strongly suggests that "Senator Feingold might be one of the 'group of Senators . . . causing gridlock and backing up some of our courts to the state of emergency." J.S. App. 41a. Unlike a discrete legislative issue that comes up for a vote once, as to which an advertisement could be carefully directed at a legislator with or without a stated position, a complaint about a recurring procedural device that has already caused "gridlock" is logically directed only at the legislators who have already supported or employed the device. Accordingly, "even a textual approach could suggest that * * * [the advertisements] might have implicitly discouraged Senator Feingold's election." *Ibid.*

electoral intent on an advertisement-by-advertisement basis. But to the extent that as-applied challenges to Congress's bright-line rule are permissible, the proper means of ensuring administrability is not by excluding potentially relevant evidence of the speaker's electoral intent by artificially limiting the inquiry to the "four corners" of the advertisement, much less barring consideration of materials (such as websites) that are expressly incorporated by reference in the advertisement. As Congress appreciated, there are great virtues in establishing a bright-line rule in this area, but the answer to avoiding uncertainty in the as-applied context cannot be to artificially narrow the inquiry to the "four corners" of the advertisement. That approach effectively reintroduces an easily circumvented test that focuses on the presence or absence of certain magic words of the sort that Congress found inadequate and replaced with a broader, but still bright-line rule that this Court has already upheld on its face.

The errors of the district court are multiple, but not discrete. The court's refusal to consider highly probative evidence outside the "four corners" of the 2004 advertisements, coupled with its inquiry into whether those advertisements were "necessarily" intended to influence an election (see pp. 32-36, *supra*), essentially framed the relevant question as whether the advertisements were on their face *incapable* of being valid issue advertisements. That approach seems functionally indistinguishable from the "express advocacy" standard, which was designed to identify "spending that is unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80. BCRA's "electioneering communications" provisions, however, reflect Congress's response to the demonstrated inadequacy of the "express advocacy" test. See *McConnell*, 540 U.S. at 126-129, 193-194. In sustaining those provisions against a facial challenge, this Court in *McConnell* squarely held that the "express advo-

cacy" standard is not constitutionally mandated. See *id.* at 190-194. Adoption of the district court's approach to as-applied challenges would be tantamount to overruling that holding.[11]

Taken in combination, moreover, the district court's "four corners" requirement and its focus on whether particular advertisements "necessarily" reflect electioneering intent suggest that BCRA § 203 cannot constitutionally be applied to an advertisement whose text alone suggests that it is likely but not certainly the functional equivalent of express advocacy, even if other evidence would make absolutely clear that the advertisement was the functional equivalent of express advocacy. Not only is that approach inconsistent with this Court's precedents, but the combined effect of the district court's errors would almost certainly render a significant percentage of advertisements during the last days of an electoral campaign immune from regulation under BCRA § 203. That prospect cannot be squared with this Court's holding in *McConnell* that BCRA § 203 is not substantially overbroad.

For the reasons that follow, the district court's rationales for purporting to limit its inquiry to the "four corners" of the 2004 advertisements are unpersuasive. In particular, the court erred in declining to consider the government's evidence concerning (a) the content of the website expressly referenced in the 2004 advertisements, (b) the timing of those advertisements, and (c) appellee's contemporaneous advocacy concerning the Wisconsin Senate race. That evidence substantially reinforces the inference that the advertisements at

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[11] Indeed, rather than faithfully implementing this Court's holding in *McConnell*, the district court's approach essentially incorporates the view taken in Justice Thomas's dissent that any power Congress may possess in this area is limited to regulation of corporate speech that is "unambiguously campaign related." *McConnell*, 540 U.S. at 281, 283 (opinion of Thomas, J.) (quoting *Buckley*, 424 U.S. at 81).

issue in this case were intended to influence the election and would likely have that effect.

1. The district court's stated reasons for declining to consider probative evidence outside the "four corners" of the 2004 advertisements are unpersuasive

a. In refusing to consider contextual evidence outside the "four corners" of the 2004 advertisements, the district court relied in part on concerns of practical administrability. The court suggested that, if the inquiry in an as-applied challenge extended beyond the text of the relevant advertisements, it would necessarily entail the deposition of the organization's officials and the submission of expert testimony. See J.S. App. 19a. The court found that such an approach would be "practically unacceptable because as-applied challenges, to be effective, must be conducted during the expedited circumstances of the closing days of a campaign when litigating contextual framework issues and expert testimony analysis is simply not workable." *Ibid.*

The district court's practical concerns are unfounded, since they presume a false dichotomy between an analysis confined to an advertisement's text and an unstructured inquiry involving all potentially relevant evidence of subjective intent. The plaintiff in an as-applied challenge should indeed be required to articulate an administrable standard for identifying a class of advertisements that, while falling within BCRA's definition of "electioneering communications," do not pose the danger at which BCRA § 203 is directed. See p. 27, *supra*. There is no basis, however, for the district court's view that any consideration of facts outside the "four corners" of the advertisement will necessarily render the inquiry unworkable.

Indeed, BCRA's definition of "electioneering communication" exposes the error in the district court's analysis. That

definition correlates strongly (though admittedly not perfectly) with actual intent to influence federal elections. See *McConnell*, 540 U.S. at 206 (stating that the "vast majority" of pre-BCRA advertisements falling within the definition had an electioneering purpose). Applying the definition to a particular advertisement requires both a narrow and focused consideration of the advertisement's text (specifically, whether it refers to a clearly identified candidate for federal office), and equally cabined consideration of external factors (whether it was aired during one of the specified pre-election periods and was targeted to the relevant electorate). The definition demonstrates that the consideration of relevant atextual factors does not require an unstructured or open-ended inquiry. A principal *virtue* of the statutory definition is that it "raises none of the vagueness concerns that drove [the Court's] analysis in *Buckley*" and does not enmesh the courts in subjective parsing of the nuances of an advertisement's text, but rather provides a bright-line rule whose "components are both easily understood and objectively determinable." *Id.* at 194. Just as the BCRA definition provides a clear bright-line rule even though it requires examination of facts outside an advertisement's text, the constitutional standard governing as-applied challenges need not be confined to an advertisement's "four corners" in order to be workable.

b. The district court also stated that a legal regime in which "federal judges would be charged with conjuring the subjective intent of the speaker to affect the election would fly in the face of decades of First Amendment jurisprudence and undoubtedly chill those exercising their free speech rights." J.S. App. 21a-22a. Appellee had no constitutional right, however, to use treasury funds to finance advertisements that were intended to influence the 2004 Wisconsin Senate race. By alleging that BCRA § 203 is unconstitutional as applied to its 2004 advertisements, appellee necessarily placed at issue

the question whether those advertisements had an electioneering purpose. Indeed, appellee's principal submission was that it lacked such a purpose even though its advertisements fell within a statutory definition that the Court not only had already upheld on its face, but also had already determined did a good (and constitutionally adequate) job of identifying advertisements with that purpose. The purported infeasibility or impropriety of deciding whether appellee has carried its burden on that point cannot plausibly be regarded as a reason to *sustain* appellee's as-applied challenge.[12]

c. As the district court recognized, potential speakers may indeed be chilled if the legality of particular communications or financing arrangements turns on an unstructured post hoc inquiry into the speaker's likely intent. J.S. App. 20a-21a; see *Buckley* 424 U.S. at 42-43. The articulation of clear, objective rules defining the circumstances under which the forbidden intent will be inferred therefore furthers First Amendment values. An inquiry limited to the "four corners" of an advertisement, however, is not inherently more objective or precise than an inquiry that includes consideration of facts external to the advertisement's text.

In any event, BCRA's definition of "electioneering communication" itself eliminates the indeterminacy that concerned the district court. Any uncertainty that appellee may face results not from lack of clarity in the law that Congress en-

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[12] The district court's analysis is especially misguided because the court also declined to assess whether the 2004 advertisements would likely have had an electoral *effect*, stating that "reliance on effect, without the requisite intent, would be the equivalent of permitting listeners' subjective impressions to justify the regulation of protected speech." J.S. App. 24a-25a. This Court in *McConnell*, however, considered both the purpose *and* the effect of prior advertisements falling within BCRA's definition of "electioneering communication" in upholding BCRA § 203 against a facial constitutional challenge. See, *e.g.*, 540 U.S. at 126-128, 193, 206.

acted, but from appellee's insistence that a less clearly defined constitutional rule effectively supersedes the statutory standard. The district court's stated objectives of improving administrability and providing clear guidance to corporate advertisers would be furthered by adhering as strictly as possible to the bright-line definition drawn by Congress and upheld on its face by this Court, and by reserving as-applied challenges for circumstances that are demonstrably removed from the core conduct at which BCRA's "electioneering communications" provisions are directed and could be defined without reference to the text or content of the advertisement, as with the *MCFL* exception. The district court, however, erroneously treated those objectives as grounds for *broadly defining* the range of circumstances under which as-applied challenges will be sustained.

2. The contextual evidence that the district court declined to consider confirms that the advertisements at issue here were likely intended to influence the Wisconsin Senate election and could be expected to have that effect

a. The most extreme example of the district court's unwillingness to consider probative contextual evidence beyond the "four corners" of the 2004 advertisements was its refusal to consider the content of the website "BeFair.org," which appellee established in conjunction with its anti-filibuster campaign, and which was explicitly referenced *in the advertisements*. See J.S. App. 22a-23a n.18. Each of the advertisements at issue here urged listeners and viewers to visit that website, see *id.* at 67a, 69a, 71a, which featured "e-alerts" excoriating Senator Feingold on the judicial-filibuster issue. See *id.* at 41a (Roberts, J., dissenting); J.A. 86-90. The district court concluded that, because internet communications are not themselves subject to regulation under BCRA's "elec-

tioneering communications" provisions, the content of appellee's website was irrelevant to the disposition of its as-applied challenge. J.S. App. 22a-23a n.18.

That is a non sequitur. A court could not cogently assess the likely purpose and effect of a broadcast advertisement urging viewers to "look at the billboard on Main and First Streets" without examining the billboard's message. The same principle applies here. The content of a website that the 2004 advertisements urged listeners and viewers to visit is manifestly relevant to an assessment of the advertisements' intended *purpose and effect*, even though the website itself is not subject to BCRA's "electioneering communications" provisions. The district court's refusal to consider this evidence is particularly striking because one of the five aspects of the advertisements that the court specifically identified as relevant to the constitutional analysis was whether the advertisements "exhort[ed] the listener to do anything other than contact the candidate about the described issue." J.S. App. 22a. Appellee's advertisements did exhort their audience to do something else. The advertisements urged listeners and viewers not only to contact Senators Feingold and Kohl directly, but also to visit a website that criticized those Senators for participating in prior judicial filibusters. Only by ignoring that exhortation could the district court conclude that the advertisements did not "reference in any way the Senators' past voting records, current positions, or previous public statements on the judicial filibuster issue." *Id.* at 24a.

Furthermore, the district court's stated concerns about the administrability of a test requiring the deposition of parties (see J.S. App. 18a-19a) are not implicated by judicial consideration of an advertisement's express reference to a website (or related forum). To ascertain the import of the reference, the court—like the listeners or viewers of the advertisement—need only visit the website and review its

contents. Here, a visit to "BeFair.org" would have confirmed that the advertisements were intended to influence a candidate election.

As a core example of the sorts of abuses that BCRA's "electioneering communications" provisions were intended to prevent, the Court in *McConnell* described a hypothetical advertisement that "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 127; see p. 31, *supra*. If the advertisements at issue here had included the statement that "Feingold and Kohl are putting politics into the court system, creating gridlock, and costing taxpayers money," J.A. 86, they would have been indistinguishable in principle from the "Jane Doe" hypothetical. Although that statement did not appear in the text of appellee's broadcast advertisements, it did appear in an e-alert posted on the "BeFair.org" website that the advertisements specifically urged listeners and viewers to visit. *Ibid.* A corporation should not be permitted to circumvent BCRA's financing restrictions through the simple device of incorporating by reference statements that could not be made in the text of an advertisement financed with corporate treasury funds.

b. The timing of the advertisements also confirms that they were aimed at influencing the election. Appellee began to run its anti-filibuster broadcast advertisements in July 2004, "days after the last of the judicial filibuster cloture votes had occurred during that session and the Senate had departed for a six-week recess." J.S. App. 43a (Roberts, J., dissenting). Appellee "did not run any additional anti-filibustering ads after the 2004 election in either 2004 or 2005 during the height of the [filibuster] controversy." *Ibid.* Appellee's effort to finance the advertisements was thus limited to the 2004 campaign season, even though public controversy over the filibustering of judicial nominees continued (and indeed

gained greater prominence) during the months following the election. See pp. 11, 13, *supra*.

BCRA's definition of the term "electioneering communication," which is limited to advertisements broadcast during the 30- and 60-day periods before federal primary and general elections, reflects Congress's judgment that the timing of advertisements that mention a federal candidate is an important indicator of the speaker's intent. In discussing the use of purported "issue" advertisements during the pre-BCRA period, this Court in *McConnell* likewise recognized that "the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." 540 U.S. at 127. The district court nevertheless refused to consider what inferences might be drawn from the timing of appellee's advertisements.

In order to rebut the inference of electioneering intent that exists when an advertisement identifying a federal candidate is aired during the 30- or 60-day pre-election window, a corporate advertiser should be required to demonstrate, at the very least, that the timing of its advertisements logically serves a non-electoral purpose. Appellee, however, commenced its advertising campaign at a time when Congress was out of session, and it abandoned its efforts after the election occurred; even though public controversy over the filibustering of judicial nominees reached its height during the spring of 2005. Those facts reinforce, rather than dispel, the conclusion that appellee's advertising campaign was *intended* to coincide with the electoral schedule, and that the pre-election timing was not simply fortuitous.[13]

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[13] Veteran political consultant Douglas L. Bailey (see pp. 31-32 & note 8, *supra*) explained:

[Appellee's] advertising strategy is inconsistent with an advocacy group

The district court's refusal to consider the relevant "timing" evidence was especially misguided because the court stated that it *would* consider whether the 2004 advertisements "describe[] a legislative issue that is either currently the subject of legislative scrutiny or is likely to be the subject of such scrutiny in the near future." J.S. App. 22a. The court thus recognized that the presence or absence of a temporal link between appellee's advertisements and Senate consideration of the judicial-filibuster issue was relevant to the disposition of appellee's as-applied constitutional claim. In determining whether such a link existed, however, the court offered only the conclusory statement that the advertisements "describe an issue that had been, and was likely to be, an ongoing issue of legislative concern in the Senate." *Id.* at 23a. The court made no focused effort to determine whether appellee's advertisements were sensibly timed to achieve their purported objective of influencing legislative debates.

c. The district court also erroneously refused to consider the fact that appellee had frequently and explicitly opposed Senator Feingold's 2004 reelection effort through other com-

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that wished to engage in "grassroots lobbying." [Appellee] did not begin to air its advertisements until a few days *after* several judicial filibusters had happened. Any competent consultant who truly wished to engage in "grassroots lobbying" would have run issue ads in the time leading up to the July filibusters, when the message would not have been obfuscated by the abundance of electioneering ads. Nor would any competent campaign consultant run ads after July 22, 2004, when the Senate left for summer recess.

J.A. 61. Indeed, the employee who generally oversaw appellee's lobbying activities acknowledged that running grassroots lobbying advertisements after the relevant votes have occurred would be "a waste of time." J.A. 29; FEC Exh. 4, at 112. The outside consultant hired for the advertising campaign at issue in this case similarly agreed that such advertisements, to be effective, should run shortly before the legislative vote that is sought to be influenced. FEC Exh. 5, at 30-31; *see* J.A. 29.

munications. See J.S. App. 41a-42a (Roberts, J., dissenting); pp. 8-11, *supra*. "Senator Feingold's participation in judicial filbustering was a particular focus of criticism by [appellee]." J.S. App. 42a (Roberts, J., dissenting). The district court concluded that, unless a particular communication was itself subject to regulation under BCRA, the existence of the communication would have "no bearing" on the resolution of appellee's as-applied constitutional challenge. *Id.* at 23a n.18. Appellee's pattern of electoral advocacy during the 2004 campaign, however, is directly relevant to the question whether the generalization on which BCRA § 203 is based—*i.e.*, Congress's determination that advertisements falling within the BCRA definition of "electioneering communication" will typically reflect an intent to affect electoral outcomes—has been proved to be inaccurate in this case.

Adoption of the district court's approach, moreover, would create substantial opportunities for circumvention of BCRA's financing restrictions on corporate electioneering. A corporation could "prime the pump" by using PAC funds to finance an advertisement that discusses an issue of public concern, denounces a candidate's record on that issue, and calls for the election of his opponent. The corporation could then use treasury funds, perhaps obtained through large donations from business entities, to air an advertisement that is substantially similar but that omits express criticism of the candidate and urges viewers to "contact" rather than "defeat" him. Although viewers' reactions to the second advertisement would predictably be colored by their prior exposure to the first, the district court's approach would treat that prospect as irrelevant to the constitutional analysis.[14]

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[14] Testifying in *McConnell*, one veteran political consultant described a "common trick" that had been used to create "sham issue ads":

> Sometimes, the media consultant for the candidate will shoot the film and

Undoubtedly some corporations are engaged in legitimate issue advocacy designed to urge changes in the law rather than to affect federal elections. And while BCRA's bright-line definition of "electioneering communication" identifies election-related advertising with a high degree of accuracy (particularly given the alternatives available to corporations that do not seek to influence elections), that definition may occasionally capture advertisements that demonstrably lack any electoral purpose or effect. The advertisements at issue in this case, however, clearly do not fit that description. Appellee's as-applied challenge therefore should be rejected, and the Court should leave for another day the difficult task of attempting to define the circumstances, if any, under which corporations can prove a constitutional entitlement to an exemption from BCRA § 203.

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sell it to the media for a reasonable rate. They simply take 2 cameras on a shoot when they are filming the candidate's ad. Camera A shoots the footage for the candidate's ad, and Camera B takes nearly identical footage that is then sold to other media consultants for a nominal fee. The media consultant for the third party just has to buy the film from Camera B and put on a clever tag line at the end.

251 F. Supp. 2d at 535 (Kollar-Kotelly, J.). The record in *McConnell* also included two NRA radio advertisements, one financed with PAC funds and the other with corporate treasury funds. The two were substantively identical except that the PAC advertisement concluded with an electioneering tag line ("Please vote freedom first. Vote George W. Bush for President."), and the other advertisement omitted any magic words of express electoral advocacy. See *id.* at 548-549. Acceptance of the district court's approach would allow similar manipulation on a systematic basis.

CONCLUSION

The judgment of the three-judge district court as to the claims at issue in these appeals should be vacated on the ground of mootness, and the case should be remanded with instructions to dismiss as to those claims. In the alternative, the judgment should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

GREGORY G. GARRE
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

THOMASENIA P. DUNCAN
Acting General Counsel

RICHARD B. BADER
Associate General Counsel

DAVID KOLKER
Assistant General Counsel

HARRY J. SUMMERS
KEVIN DEELEY
Attorneys

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In The

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Appellant*

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*

SEN. JOHN MCCAIN ET AL., *Intervenor-Appellants*

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*

On Appeal from the United States District Court
for the District of Columbia

Brief for Appellee

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Jeffrey P. Gallant
Raeanna S. Moore
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434
812/235-3685 (facsimile)
Lead Counsel for WRTL

M. Miller Baker
Michael S. Nadel
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, DC 20005-3096
202/756-8000
202/756-8087 (facsimile)
Counsel for WRTL

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QUESTIONS PRESENTED

1. Whether this case is within the exception to mootness for matters capable of repetition yet evading review.

2. Whether the electioneering communication prohibition at 2 U.S.C. § 441b is unconstitutional as applied to the facts of this case, and particularly

(a) the three specific grassroots lobbying broadcast communications sponsored by Wisconsin Right to Life, Inc. ("WRTL") here and/or

(b) genuine grassroots lobbying communications,

with any communications to be funded from a general corporate account or, alternatively, from a separate bank account to which only qualified individuals may donate, as defined in 2 U.S.C. § 434(f)(2)(E).

3. Whether this Court's facial upholding of the electioneering communication prohibition in *McConnell v. FEC*, 540 U.S. 93 (2003), must be overturned because (a) Appellants insist that WRTL's ads are in the "heartland" or "core" of what Congress intended to restrict with the electioneering communication prohibition and (b) in practice the remedy of as-applied challenges to protect genuine issue ads has proven inadequate.

CORPORATE DISCLOSURE STATEMENT

Wisconsin Right to Life, Inc. has no parent corporation and is a nonstock corporation, so no publicly held company owns ten percent or more of its stock. Rule 29.6.

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147 Cong. Rec. S2846 51

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William Blackstone, *Commentaries on the Laws of England*, Book IV (T. Cooley, ed.: 2d ed., rev. ed. 1872) . . 2

James Bopp, Jr. & Richard E. Coleson, *Distinguishing "Genuine" from "Sham" in Grassroots Lobbying: Protecting the Right to Petition During Elections*, 29 Camp. L. Rev. 353 (2007), http://www.law.campbell.edu/pubs/articles.cfm. 8, 23, 39, 42, 51-57

Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords (attached to Letter from Sen. John McCain, Sen. Russell D. Feingold, et al. to Mai T. Dinh of the FEC (Aug. 23, 2002)), http://www. fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf. . 52, 54

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Paul Kane, *GOP Cools to Judicial Gambit*, Roll Call, Sep. 13, 2004 15

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Bradley A. Smith & Jason Robert Owen, *Boundary Based Restrictions in Unbounded Broadcast Media Markets: McConnell v. FEC's Underinclusive Overbreadth Analysis*, 20 Stan. L. & Pol'y Rev. 101 (2007) ... 30-31

STATEMENT

1. ***Roots of This Case.*** The deep roots of this case lie not in the Bipartisan Campaign Reform Act of 2002, the Federal Election Campaign Act of 1971, the Taft-Hartley Act of 1947, the Tillman Act of 1907, nor even the First Amendment, but in the struggle of the Anglo-American people to (a) establish themselves as sovereign and (b) curb the power of government officials to prevent the people from criticizing official actions.[1]

"[I]n the three centuries prior to the Declaration of Independence, the King required the suppression of ideas antagonistic to the Crown" by sedition laws, control of the press, and constructive treason. Nowak, Rotunda & Young, *Constitutional Law* at 830. The Star Chamber developed the doctrine that the King originated justice and was above criticism, without regard to truth (truth merely enhanced the libel). *Id.* at 831 (citations omitted). There was also the prior restraint of government licensing before publication could be lawful. *Id.*[2]

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[1]In the Middle Ages, religious authority established political authority, and religious and governmental authorities who believed that they ruled infallibly by divine right sought to suppress popular opinion. John E. Nowak, Ronald R. Rotunda & J. Nelson Young, *Constitutional Law* at 830 (3d ed. 1986) [hereinafter Nowak, Rotunda & Young, *Constitutional Law*]. "Dissent from this authority meant not only to be wrong, but to be damned." *Id.* As governments became less accountable to religious authorities, government officials yet felt it "essential . . . that the popular opinion of the government be preserved" to facilitate taxation and conscription. *Id.* (citation omitted).

[2]A leading light in the reform effort that ultimately led to the First Amendment was John Milton, who battled English censors and wrote this eloquent defense of liberty in 1644: "[T]hough all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licencing and prohibiting, to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors in a free and open encounter?" John Milton, *Aeropagitica* 51-52 (John W. Hales, ed., 3d. ed. 1882).

These oppressive practices were carried into the American colonies, as was the original reform movement, which was the effort to restrict the government's ability to prevent the people from discussing public issues and public officials' conduct of their office. *Id.* at 832.[3] The Framers of the American Constitution protected the people by limiting government powers, and in 1791 the people ratified the First Amendment, mandating that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. This great reform victory was aimed directly at halting incumbent politicians' efforts to silence criticism about their actions.[4] America had adopted the marketplace of ideas. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

Despite the First Amendment, politicians persisted in efforts to silence criticism with enactment of the Sedition Act of 1798.[5] The Sedition Act "first crystallized a national awareness of the central meaning of the First Amendment." *New York Times v.*

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[3]By 1765, when Blackstone first published his *Commentaries*, the battle against prior restraints had been largely won, but publishers were yet subject to seditious libel laws. Nowak, Rotunda & Young, *Constitutional Law* at 832-33 (*citing Commentaries on the Laws of England*, Book IV pp. *151-52 (T. Cooley, ed.: 2d ed., rev. ed. 1872)).

[4]These visionaries saw that "a central value of the free press, speech, and assembly lies in 'checking' the abuse of power by government officials" and it is necessary to avoid the "slippery slope" of giving government power to restrict speech "when a government's natural inclination is moving the line towards more suppression of criticism and unpopular ideas." Nowak, Rotunda & Young, *Constitutional Law* at 836.

[5]The Act barred "publishing any false, scandalous and malicious writing . . . against the government . . . , or . . . Congress . . . or the President . . . with intent to defame . . . or to bring them . . . into contempt or disrepute . . . ." 1 Stat. at Large 596 (truth was a defense).

Sullivan, 376 U.S. 254, 273 (1964). The Act was attacked as unconstitutional by Jefferson, Madison, and the Virginia General Assembly, the latter condemning it for restricting "'the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.'" *Id.* at 274 (citation omitted). Madison wrote the protest Report,[6] founding his argument on the fact that the "Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty,'" *id.* at 274 (citation omitted), and in the House of Representatives Madison also observed: "'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.'" *Id.* at 275. "The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government." *Id.* at 275. As a result, "the court of history" had reached a "broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *Id.* at

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[6]The Report noted the lack of accountability that would result if officials were free of ongoing public scrutiny and discussion of their actions:

> It is manifestly impossible to punish the *intent* to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; . . . which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct. Nor can there be a doubt . . . that a government thus intrenched in penal statutes against the just and natural effects of a culpable administration, will easily evade the responsibility which is essential to a faithful discharge of its duty.

New York Times, 376 U.S. at 275 n.15 (quotation marks and citation omitted) (emphasis added).

276. The Act expired in 1801, and those convicted under it were pardoned and their fines remitted by President Jefferson. *Id.* & n.16.

Bridges v. California, 314 U.S. 252 (1941), dealt with another effort to silence criticism, this time of judges, where individuals, who had published stories about pending cases were fined for contempt of court. *Id.* at 258. This Court rejected reliance on English common law allowing such speech suppression because "'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.'" *Id.* at 264 (citation omitted). The Court noted the asserted "substantive evil" of "disrespect for the judiciary," *id.* at 270, which included "*criticism* of the decision of the court," *id.* at 270 n.15 (emphasis added), and rejected the "assumption that respect for the judiciary can be won by shielding judges from published *criticism*." *Id.* at 270 (emphasis added). The Court said "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *id.* (footnote omitted), and concluded that "an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than . . . enhance respect. *Id.* at 270-71.

In 1964, *New York Times v. Sullivan*, 376 U.S. 254, dealt with another effort by politicians to silence criticism. Despite the libel immunity that public officials enjoy for their public debate (in order to encourage robust debate), Alabama's libel law provided no similar immunity to the people's discussion of public officials' actions. A group supporting Dr. Martin Luther King, Jr. took out a *New York Times* ad criticizing the actions of police in Montgomery, Alabama against civil-rights demonstrators. The city commissioner in charge of police claimed that the ad libeled him by implication. *Id.* at 288. This Court established the "actual malice" standard for discussing public officials, reaffirming "a profound national commitment to the

principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

This struggle of the government to silence the people continues here as BCRA sponsors, Intervenors herein, defend the "electioneering communication" prohibition[7] by declaring that quashing criticism is the true intent behind the provision and thus argue that broadcast ads are sham, not genuine, if the ads (a) "took a *critical* stance regarding a candidate's position on an issue" and (b) "referred to the candidate by name." Intervenors' Br. at 22 (emphasis added). Intervenors' Brief is replete with complaints about Senators being criticized for their positions on a current legislative matter. *See id.* at 3, 10, 11, 15, 16, 22, 23 n.11, 24, 25 n.14, 27, 28, 36. So is the FEC's Brief. *See* FEC Br. at 10, 11, 19, 20, 33, 44, 48.

The roots of this case also lie in the right of the people to engage in self-government by employing their First Amendment liberties to amplify their voices through associating, *see Buckley v. Valeo*, 424 U.S. 1, 15 (1976) and in the unquestioned right of corporations to freely advocate issues. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978). So with respect to "*genuine issue ads*," *McConnell v. FEC*, 540 U.S. 93, 206 n.88 (2003) (emphasis added), there is no corporate-form interest to justify a *prohibition*. Historically, the Constitution and this Court have protected corporate expression about public policy generally and about the adoption of laws specifically. Thus, pro-

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[7]"Prohibition" herein refers to 2 U.S.C. §§ 441b(a)-(b)(2) (2004) ("It is unlawful for any . . . corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election . . . . '[C]ontribution or expenditure' includes . . . any applicable electioneering communication."). "Prohibition" is an appropriate term because it was used by Congress, BCRA § 203 (entitled "Prohibition of Corporate and Labor Disbursements for Electioneering Communications"), and this Court. *McConnell*, 540 U.S. at 203 (same). Despite the possibility of a PAC-option, a corporation is still *prohibited* from using its own general funds.

hibiting corporations from effective grassroots lobbying has no hoary heritage. Rather, banning corporate grassroots lobbying in "genuine issue ads" is a recent innovation that was spawned in 1947, halted by this Court in 1976, respawned in 2002, and identified by this Court as likely unconstitutional in 2003.[8]

Roots of this case also lie in the passage of BCRA,[9] wherein sponsors of the provision that became the present prohibition promised to protect "genuine issue ads" and particularly grassroots lobbying. *See infra* at Part IV.A. And on the floor, sponsors promoted a provision to authorize the FEC to make

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[8]The Tillman Act only restricted corporate "*contributions* in connection with any election to public office," 34 Stat. 864-65 (emphasis added), so it has nothing to do with the present case, which is about WRTL's own expression. Not until *1947* did Congress try to limit corporate *expenditures* in the Taft-Hartley Act, which limitation was only in full effect until this Court had an opportunity to address it in *Buckley*. 424 U.S. 1. Then this Court noted (a) the vagueness of regulating "any expenditure . . . relative to a clearly identified candidate," *id.* at 42, (b) the fact that "incumbents[] are intimately tied to public issues involving legislative proposals and governmental actions," *id.* at 43, and (c) the rejection of any "'intent and . . . effect'" test in *Thomas v. Collins*, 323 U.S. 516, 535 (1945), and imposed the express advocacy construction to protect a speaker from being "'at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.'" *Buckley*, 424 U.S. at 42 (*quoting Thomas*, 323 U.S. at 535). The prohibition on corporate independent expenditures was also restricted to express advocacy in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("*MCFL*"). Under the express advocacy test, WRTL is completely free to run its grassroots lobbying ads. Only in 2002, did Congress again seek to limit such legislative advocacy with its electioneering communication prohibition in BCRA, and even then there was a recognition of the constitutional need to protect the people's right to petition through grassroots lobbying, *see infra* at Part IV.A and this Court in *McConnell* "assume[d]" that as to "genuine issue ads" the prohibition might not survive challenge. 540 U.S. at 206 n.88.

[9]BCRA was supposed to restore the people's trust in government, but instead it declined. *See* The American National Election Studies, "Trust in Government Index 1958-2004" (2002 score of 43 down to 37 in 2004), available at http://www.electionstudies.org/nesguide/toptable/tab5a_5.htm.

exemptions in order to protect "genuine issue ads," *id.*, which led to a 2002 FEC rulemaking on the prohibition, in which the FEC solicited comments on proposed language for a rule exempting grassroots lobbying and then refused to make a rule. *See infra* at Part IV.A-B.[10]

Roots lie in the *McConnell* litigation where *genuine issue ad* was a term of art and specific ads were identified as "genuine issue ads" or sham ads. For example, all three district court judges noted that a grassroots lobbying ad—called herein the "PBA Ad"—was recognized by key defense expert Prof. Goldstein as a "genuine issue ad."[11] As set out below, *infra* at Part IV, this PBA Ad is remarkably like WRTL's ads, proving that they are also "genuine issue ads." Judge Leon also listed "representative examples" of both "genuine issue advertise-

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[10]BCRA prime sponsors and campaign finance reform lobby groups joined in proposing rules to distinguish genuine issue ads from sham ads by focusing on the content of the ads without any investigation into intent-and-effect context. *See infra* at Part IV.B Yet the FEC rejected their rules, along with their rationale, and refused to make a rule. *See infra* at Part IV.A. In 2006, the FEC was twice more asked to make a rule and twice refused, *id.*—even after the Solicitor General was asked at oral argument why the FEC had not made a rule to protect grassroots lobbying, Transcript of Oral Arg. at 43-44 *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410, 126 S. Ct. 1016 (2006) ("*WRTL I*") (No. 04-1581), and the unanimous opinion of the Court took note of its ability to do so. 546 U.S. 410, 126 S. Ct at 1017.

[11]*McConnell v. FEC*, 251 F. Supp. 2d 176, 312 (D.D.C. 2003) (Henderson, J.), 905 (Leon, J.), 748 (Kollar-Kotelly, J.). This "genuine issue ad" was originally called the "Feingold Kohl Abortion 60 Ad" but for ease of memory is called the "PBA Ad" because its topic is partial-birth abortion ("PBA"). Furthermore, the Brennan Center's *Buying Time* reports, which played a central role in *McConnell* and were based on Goldstein's work, acknowledged that the prohibition swept in "genuine issue ads." The key question by which Goldstein's student coders distinguished genuine from sham issue ads was Question 6: "'In your opinion, is the purpose of this ad to provide information about or urge action on a bill or issue, or is to generate support or opposition for a particular **candidate**.'" *McConnell*, 251 F. Supp. 2d at 308-09 (Henderson, J.) (citation omitted) (emphasis in original question).

ments" and "candidate-centered issue advertisements."[12] So when this Court in *McConnell* "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," 540 U.S. at 206 n.88, these genuine issue ads were before the Court. The whole *McConnell* facial analysis of the prohibition was to determine whether it swept in too many of these "genuine issue ads." *Id.* at 203-07.

2. *Present Appeals.* The present appeals arise from a constitutional challenge to the electioneering communication prohibition as applied to WRTL's grassroots lobbying ads. In July 2004, Senate filibustering of President Bush's judicial nominees had reached unprecedented, double-digit levels and was coming to a head. Helen Dewar, *Senate Democrats Block 3 More Bush Judicial Nominees*, Washington Post, July 23, 2004, at A05; Record 30:3 (*AVC* ¶ 10).[13] WRTL launched a grassroots lobbying campaign to encourage its Senators to oppose the filibuster. Record 30:3-4, 7-8 (*AVC* ¶¶ 12-13, 25-33).[14] From August 15 to November 2, 2004 (80 days, including

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[12] *Id.* at 914-18. For analytical convenience, a number of ads (including all *five* of WRTL's grassroots lobbying ads in the record and the ad at issue in *Christian Civic League of Maine, Inc. v. FEC* (No. 06-589 in this Court) ("*CCLM*")) have been collected in the Appendix to James Bopp, Jr. & Richard E. Coleson, *Distinguishing "Genuine" from "Sham" in Grassroots Lobbying: Protecting the Right to Petition During Elections*, 29 Camp. L. Rev. 353 (2007) [hereinafter Bopp & Coleson, *Distinguishing*] (print version forthcoming 2007) (Article currently accessible online at www.law.campbell.edu/lawreview, by following the "Issue – Full text" link, then following the "Volume 29, Number 3 – Spring 2007" link.). The Appendix also assists analysis by collecting several proposed tests—including by Intervenors and their counsel—to distinguish genuine issue ads from sham ads.

[13] On July 21, the Senate failed to invoke cloture on the ongoing filibuster of the nomination of William Gerry Myers III as a judge on the U.S. Court of Appeal for the Ninth Circuit. Record 30:3 (*Amended Verified Complaint* ¶ 8 ("*AVC*")); 150 Cong. Rec. S8459-60. A fall showdown was predicted. Record 30:3 (*AVC* ¶¶ 8-11); Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1.

[14] On July 26, 2004, WRTL began broadcasting a radio advertisement

November 2), WRTL's ads would have been prohibited electioneering communications.[15]

Broadcast advertisements are the most effective form of communication for a grassroots lobbying campaign.[16] While WRTL did not believe that it was constitutionally required to use PAC funds for what it regards as constitutionally protected "genuine issue ads," using funds from WRTL's federal political committee fund ("WRTL-PAC") was an inadequate option.[17]

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entitled "Wedding," Record 30:3 (*AVC* ¶ 12), JS App.3a, and also broadcast two other ads before all broadcasting was halted by the prohibition. (The text of "Wedding" and the other two ads broadcast, "Loan" and "Waiting" are at JS App. 3a n.3, 4a n.4, and 5a n.5, respectively). WRTL intended to continue broadcasting its grassroots lobbying ads, and materially similar ads, throughout August 2004 and until the matter was voted on in the fall. Record 30:3-4, 7 (*AVC* ¶¶ 12-13, 28-29); JS App. 6a.

[15]Record 30:2, 4, 6 (*AVC* ¶ 6, 13-14, 23-34); JS App. 6a-7a. From August 15 to September 3 (30 days before the primary election), the prohibition existed solely because of Wisconsin's September primary, during which Sen. Feingold ran *unopposed*, as noted by Appellants' amici curiae Briffault and Hassen. *See* Briffault & Hasen A.C. Br. at 25 n.9. These amici suggest that an exemption might be appropriate where a candidate is running unopposed, and note that, in the *CCLM* case (No. 06-589), Sen. Snowe was running unopposed in her primary. *Id.* Judge Kollar-Kotelly apparently agreed, claiming that the "uncontroverted record" in *McConnell* showed that genuine issue ads could be distinguished from "candidate-centered issue advocacy" on three criteria, the third being "if the advertisement is run in a competitive race." *McConnell*, 251 F. Supp. 2d at 567.

[16]Non-broadcast communications would not have provided WRTL with sufficient ability to reach people with WRTL's message. Record 30:10 (*AVC* ¶ 51). In *McConnell*, Judge Kollar-Kotelly expressly found that other means of communication were less effective (and some were more expensive) than broadcasting. 251 F. Supp. 2d at 569-73 (*citing* various experts).

[17]As of August 6, 2004, WRTL-PAC had $13,766.90 in its account. And these were the only funds that WRTL could use for federal candidate contributions and independent expenditures. 2 U.S.C. § 431(8) and (17) (definitions). If these funds were used for the grassroots lobbying ads, they would not have been available for the contributions and independent expenditures that WRTL-PAC intended to make, Record 76, Attachment 1

So on July 28, 2004,WRTL filed its verified complaint and sought a preliminary injunction to permit continued running of its ads past the August 15th beginning of the prohibition period. WRTL challenged the *prohibition*, not *disclosure*, and was prepared to provide the full disclosure required under BCRA.[18]

The preliminary injunction was denied on August 12, 2004, and WRTL ceased broadcasting because its ads were prohibited. The district court dismissed the case on the basis that the language and logic of *McConnell* precluded as-applied challenges and added that "'WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating,'" *WRTL I*, 546 U.S. 410, 126 S. Ct. at 1018 (citation omitted).

In *WRTL I*, the FEC argued that *McConnell*'s approval of the "bright-line" "electioneering communication" precluded as-applied exemptions and that WRTL's ads were not genuine issue ads. *Id.* Despite these arguments, this Court unanimously remanded the case for consideration of the merits of the as-applied challenge.[19]

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at 3-4 (Lyons Affid. ¶¶ 1-7), and were not sufficient for the planned grassroots lobbying advertising expenditures of $100,000. *Id.* at 6 (Lyons Affid. ¶ 14). PAC money is also difficult to raise, being subject to source, amount, and disclosure requirements, and WRTL believed it could not raise sufficient funds in its PAC to fund the grassroots lobbying campaign. *Id.* at 4-5 (Lyons Affid. ¶¶ 8-10).

[18]Full disclosure of WRTL's identity and activities as required by law would have been forthcoming. Record 30:8-9 (*AVC* ¶¶ 35-37). WRTL's ads contained the disclaimers required by 11 C.F.R. § 110.11. Record 30:9 (*AVC* ¶ 36); *see* JS App. 3a-5a (transcripts). WRTL's electioneering communication activity would have triggered a "disclosure date" of August 15, requiring it to file a report of electioneering communication activity by 11:59 p.m. on August 16. Record 30:8 (*AVC* ¶ 34).

[19]On remand, WRTL argued that the district court should reinstate and decide cross-motions for summary judgment that had been completed before the district court dismissed the case, but the court permitted extensive discovery and ordered new summary judgment briefing. WRTL argued that

Since this Court has rejected any intent-and-effect test, *Buckley*, 424 U.S. at 42, Appellants' reliance on a voluminous record purporting to attempt to prove WRTL's intent in running the ads and the ad's speculative effect on the 2004 election is misplaced. WRTL vigorously disputed many of Appellants' factual allegations below. For example, the FEC cites a swatch of its *proposed* findings of fact allegedly supporting the assertion that WRTL had "intended from the outset to air the advertisements during the BCRA pre-election period, even though the agency was generally capable of creating a radio advertisement in a week and television advertisements in two weeks." FEC Br. at 11, n.3; *see also id.* at 11, 13 (citing and quoting, respectively, Judge Roberts's dissent in the lower court criticizing the timing of the ads and the lack of ads after the 2004 election (which cites, in turn, Appellant's limited excerpts of deposition testimony)).

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any proper rule would focus on the communication's text and the relevant context (*see infra* at n.30), but the court permitted discovery on the intent-and-effect context that the FEC and Intervenors said was necessary to their theory of the case. As a result, even in this (statutorily-mandated) "expedited" case, WRTL was subjected to depositions of its executive director and its legislative and PAC director. Even the lead communications consultant at its outside advertising agency was deposed, as was a woman who did fundraising for WRTL. WRTL was required to produce a substantial volume of documents about its inner workings, plans, and finances—all information that an ideological group would otherwise keep private. Since the FEC retained two experts, WRTL attorneys needed to depose them. Since Sen. McCain et al. were permitted to intervene, WRTL has been required to respond to double briefing and extra discovery requests. The docket below shows that the FEC had 10 attorneys working on the case and the Intervenors have enjoyed the full support of the campaign finance reform lobby and counsel associated with them. *See, e.g.*, Intervenors' Br. (listing 19 attorneys). In sum, there has been a substantial investment of time and money by WRTL in this case that could have been put to advancing ideological causes by speech and petition had it not been required to vindicate constitutional rights to do so. No attorneys fees are awarded in lawsuits against the FEC, as would be the case when states violate constitutional rights.

The district court ultimately found Appellants' approach—an investigation attempting to establish the intent of the would-be speaker and the likely effect of its communication on the election—to be practically and theoretically inappropriate and so made no findings as to an external intent-and-effect context.. Even the dissent thought that key facts were not established and would require a trial to resolve. *See* JS App. at 30a, 45a, 46a, 47a-48a (references herein are to the *FEC*'s JS App.). And because WRTL objected to many alleged facts, *see* Record 88, Attachment 2; Record 89, Attachment 1, and proposed countering findings of fact, *see* Record 103, Appellants may not portray their version of the alleged intent and effect of the ads as established. In fact, WRTL did *not* intend to affect the election,[20] and defense expert Bailey expressly stated at his deposition that WRTL's Waiting Ad might not have *any* effect on the election. JA 148.

A prime example of the two views of the facts is the timing of WRTL's ads. Since this is a centerpiece of Appellants "intent" argument it will be addressed. The record evidence

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[20]Ample evidence shows that WRTL's ads were not intended to affect the 2004 election. For example, Defendants' expert Franklin agreed that the ads' target demographic, "public policy aware adults, ages 45+ with male skew," Record 81-2:44 (Franklin Exp. Rep. at 36), meant the ads were effective with people "less likely [to] change [their] mind" or "convert," but "more likely to make the call [to a senator about the issue]." JA 196-97. *See also* Record 81-2:78, 79 (Lyons Dep. at 26:6-17,31:17, 33:5-11) (WRTL did not discuss any other purpose for or any impact on elections from the ads and had no reason to think that the ads would affect the election); Record 81-2:163-64, 166, 168, 185-86) (Vanderground Dep. at 45:25-46:2, 54:11-14, 63:14-64:2, 133:11-134:8) (ad consultant never told purpose of campaign was to affect election, never researched or considered affecting election, and never discussed with anyone or remembered "even an offhand comment anywhere" that purpose was, or "likely impact" would be, to affect election and did not believe ads impacted race); Record 81-2:196-97, 199 (Weiss Dep. at 14:10-20, 15, 23:11-25) (fundraiser told purpose was "to deal with the issue of filibustering," no candidates were mentioned, and when contacting possible donors she never mentioned any other reason for giving).

shows that WRTL ran the ads when public interest in the filibustering issue, actual and projected filibuster votes, and the ability to create and fund the ads and website coincided.[21] Barbara Lyons had advised media consultant Vanderground that she would like to get the anti-filibuster campaign started as soon as possible. Vanderground looked at how long it would take to develop TV and radio ads, along with the BeFair.com website that he recommended as most effective for contact and background information, and said that July 26, 2004, was the first date possible to launch the campaign—based on making all the preparations. Record 81-2:174.[22] As for whether it is

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[21]The snippet of testimony that the FEC cites as "indicat[ing]" that WRTL intended to air the Ads during the prohibition period so that "the advertising campaign would result in litigation" FEC Br. at 11 n.3, was from Jason Vanderground, the experienced lead consultant employed by Hanon McKendry, the advertising and brand consulting firm hired by WRTL to prepare its grassroots lobbying campaign. When read as a whole, Vanderground was recalling WRTL's Executive Director, Barbara Lyons, explaining how the electioneering communication prohibition might affect the broadcast schedule for the ads: "She felt like that she understood that Campaign Finance Reform [sic] said that there was a certain time when the ads couldn't run . . . ." Record 81-2:162-63 (Vanderground Dep.). WRTL's explanation of the law's effect was accurate and offering it to the person responsible for the planning and broadcast of the ads was unremarkable. To Vanderground's recollection, the point Barbara Lyons made was that WRTL understood that unless an injunction were granted, the ads couldn't run at a certain time because the electioneering communication prohibition would apply, not that WRTL intended to run them when they were prohibited or wanted to plan the ads' broadcast to result in a lawsuit. When counsel for the FEC asked Vanderground if Lyons "or other people from [WRTL]" indicated that she expected the ad campaign to result in a court case, he answered "she told me that she was hopeful that we would be able to continue to running the campaign." *Id.* Contrary to the FEC's characterizations, the record shows that WRTL's focus was on running the ads effectively and that it was hopeful that the broadcasts would not have to be interrupted. Vanderground did not understand Lyons or anyone at WRTL to communicate or give the impression that the ads or their broadcast were to be developed so as to lead to a court challenge to the prohibition. *Id.*

[22]The project could not be launched earlier because it was a large, inte-

important to run grassroots lobbying advertising shortly before legislative votes occur, see FEC Br. at 11; Intervenors' Br. at 27, according to WRTL's experienced consultant, timing the ads to coincide with existing public interest was as important as timing them to run "shortly before" legislative votes.[23] The

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grated campaign and there just wasn't enough time to make preparations earlier, especially during the summer months with vacations. Based on its schedule and the work Hanon McKendry had to do, the campaign could not be launched earlier. Record 81-2:174. In urgent circumstances Hanon McKendry can create and air radio ads in about a week and television ads in about two weeks, *id.* at 158, 174, but WRTL's campaign required significantly more time because of the planned quality of the spots, and the required time for strategy writing, developing creative concepts, refining ideas, planning production, and producing the ads. *Id.* at 174-75. Lyons never indicated to Vanderground that the timing had anything to do with when the prohibition would begin or that potential litigation played any role in the timing, rather he said that the primary reason for the timing was the prominence of the filibuster issue then and WRTL's desires to address it while it was in the media and as soon as possible. *Id.* at 175.

[23]When asked by counsel for FEC whether it was generally preferable to run advertising "like the filibuster advertising" close in time to when the legislative vote is to occur, Mr. Vanderground said "[i]t could be . . .[but] [n]ot necessarily." Record 81-2:167. He explained:

> . . . a lot of times you're timing it more around when the issue has some attention, when it's a natural time to direct people's attention to it, and so it would—if it was an issue that was being addressed in the public sector, it would make sense to have the campaign run then irregardless of whether or not there was a specific vote on a specific day or a specific week. . . . We have an issue, people are talking about that issue, and so it makes sense to address that issue right now, and just because an environmental situation may change and then may change and then may change again, that doesn't necessarily mean that you would completely change what you're doing as a campaign just because one element of that may take a different shape.

Id. at 167-68. When asked why it wasn't important in scheduling the campaign to track when the votes were going to occur, Vanderground answered that he was "thinking much more about—the public opinion arena and . . . looked more at that it was a topic of significant conversation and less

record shows that the level of public interest in judicial filibusters coincided with WRTL's running the ads. From March 2003 to June 2004, when WRTL decided to run the anti-filibuster ads, Senate Democrats had blocked confirmation votes sixteen times, JA 223 (Franklin Expert Rep. at 7), creating strong public interest at that time. And as events unfolded, there was no reason to suppose that public interest had waned, nor, accordingly, to adjust the schedule for the ads. During July and August of 2004, the publicity surrounding judicial filibustering was at a crescendo. The Republican leadership held four votes on stalled nominations between July 20 and 22, ending with the twentieth failed attempt. *Id.* On July 21, 2004, the U.S. Senate voted 53 to 44 in favor of a motion to invoke cloture, but the motion failed to garner the required three-fifths vote to invoke cloture. 150 Cong. Rec. S8459-60; Record 30 (*AVC* ¶ 8). The Senate Judiciary Chairman publicly predicted that judicial filibusters would mount before fall adjournment. Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1. Record 30 (*AVC* ¶ 9). Thus, there was no reason to adjust the schedule for the ads, and the fact that WRTL did not do so suggests, if anything, only that WRTL took the advice of its advertising agency.[24]

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on the specific dates in the actual Senate schedule." *Id.* at 167. And while Sue Armacost, WRTL's on-staff legislative lobbyist, agreed in her deposition with the unremarkable proposition that grassroots efforts should occur "fairly close in time to when the votes actually would occur" as opposed to after those votes, Record 81-2:145, this does not conflict with the view that the timing of the ads should be steered mainly by public interest, as advised by Vanderground. Such interest did, in fact, drive the timing of the ads.

[24]Contrary to predictions, the anticipated "fall showdown" did not materialize and no more judicial filibuster votes occurred in 2004, FEC Br. at 11, although WRTL had no way of predicting that when it decided to prepare and run its ads. Senate Republican leaders decided in November 2004 not to press the predicted confrontation at that time. *See* Paul Kane, *GOP Cools to Judicial Gambit*, Roll Call, Sep. 13, 2004. Majority reelection of President George W. Bush and Republican increases in both houses of

In the spring of 2005, the filibuster issue was different than it had been in 2004. So there was no reason for WRTL to run ads then. The spring-2005 debate was whether the Senate leadership could garner enough Republican votes to change Senate rules to preclude judicial nominee filibusters, not whether judicial filibusters were good or bad per se or whether the Wisconsin Senators should be supporting them. Record 76, Attachment 1 at 12 (2d Lyons Affid. ¶ 9). The central question was whether Senate Majority Leader Frist could get fifty Republican senators to support the rule change because it was certain that no Democrat senators would support it. Since Wisconsin had no Republican senators, there was no senator to lobby in Wisconsin. *Id.* Defense expert Charles H. Franklin, III agreed that what "came to a head" then was the debate over the use of the so-called "nuclear option":

> The Republican leadership had signaled clearly that it was ready to bring an end to the democratic filibuster through the so-called nuclear option, to change the rules to require only 51 votes to end debate on judicial nominations. . . . [I]n the March to May time frame, it was clear that it was going to be scheduled. . . . [I]t was clear that it was coming to a head . . . .

JA 205-06 (Franklin Dep. 27:10-20).[25] Finally, the record shows

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Congress in the November 2004 election minimized the Democrat argument for filibusters somewhat, *see 'Nuclear' Truce*, Roll Call, Nov. 17, 2004, and the filibuster problem was at least temporarily put to rest by an agreement among a bipartisan coalition of Senators. *See* Paul Kane & Mark Preston, *Fourteen Senators Sign Off on Compromise*, Roll Call, May 23, 2005. As counsel for WRTL explained in oral argument before this Court in *WRTL I*, "the filibuster issue, as it related to that session of Congress, it was thought that it was going to come to a head in—in October . . . but it did not." Transcript of Oral Arg. at 9, *WRTL I*, 546 U.S. 410 (No. 04-1581). It was fully appropriate to run WRTL's ads while the Senators were in their home state for recess because they were then more readily accessible to the people back home who would want to lobby them in person on the issue.

[25]Running anti-filibuster ads in the spring of 2005 was also inadvisable

that when sufficient public interest was sustained long enough to allow preparation time, and its available resources allowed, WRTL has run anti-filibustering ads.[26]

This extended discussion of the temporal context of WRTL's ads demonstrates that Appellants' assertions of "fact" and repeated mantra of "undisputed facts" must be viewed with extreme caution because (1) much of what they allege as to facts indicating WRTL's intent is in fact disputed and (2) the undisputed, statutorily and constitutionally cognizable facts are quite limited. *See infra* at n.30 (relevant context) and *infra* at Part IV.C, n.68, n.70.(scope of statutory and constitutional

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because as communication consultant Jason Vanderground testified, it was doubtful whether public interest in the judicial filibuster issue had reached a suitable level then to make an ad campaign viable. Record 81-2:189. Even when instructed by counsel for the FEC to assume that at that time, "the country was paying . . . a lot of attention to the issue," *id.*, Vanderground was still unable to agree that it "would . . . have made sense" to "resurrect" WRTL's campaign. *Id.* When FEC counsel suggested that the attention the issue garnered in the spring of 2005 should have matched that of August of 2004, Vanderground did not agree that it had necessarily reached a comparable crescendo: "My . . . recollection of the situation that you're describing was that it became an issue, very quickly it heated up, and then there was an agreement, and then it really—it became an issue with much less focus, and that the whole scenario happened relatively quickly." *Id.* at 189. It was Vanderground's opinion that public interest in the issue in the spring of 2005 reached a suitable level only for a very short time, making it a poor candidate for an ad campaign that could take considerable time and expense to mount. *Id.* As counsel for WRTL explained in the January, 2006 oral argument in *WRTL I*, "each organization has to make an assessment with respect to the different issues that they want to be lobbying on and the—their pressing nature." Transcript of Oral Arg. at 9, WRTL I, 546 U.S. 410 (No. 04-1581).

[26]WRTL ran an anti-filibuster grassroots lobbying ad in January, 2006, when a filibuster of Supreme Court nominee Samuel Alito was threatened. It is the opinion of WRTL and of Barbara Lyons, based on her many years of experience in legislative matters, that the ad affected Senator Kohl's subsequent vote in favor of cloture. Record 76, Attachment 1 at 11 (2d Lyons Affid. ¶ 7).

cognizability).

WRTL has acknowledged from the beginning that, in communications other than its grassroots lobbying ads, both it and WRTL-PAC have made prior statements opposing Sen. Feingold, both as to his position on the filibusters and as a candidate, but as noted below, these separate statements by WRTL and by the legally distinct WRTL-PAC, *Cal. Med. Assoc'n v. FEC*, 453 U.S. 182, 196 (1981) (PAC is "is a separate legal entity that receives funds from multiple sources and that engages in independent political advocacy."), are neither statutorily nor constitutionally cognizable in evaluating whether the ads at issue are "genuine issue ads." *See infra* at Part IV.C, n.68, n.70. WRTL has acknowledged from the beginning that it accepts some corporate funds. Some corporate funds were donated for the anti-filibuster campaign. However, this does not give rise to any corporate-fund conduit interest because corporations can do petitioning by genuine issue ads. *Bellotti*, 435 U.S. at 774.

As with the extended discussion of the timing of WRTL's ads, a discussion of the opinions of the defense experts is pertinent because it is a centerpiece of Appellants' argument as to "effect" of the ads on the election. Both of the FEC's expert witnesses recognize grassroots lobbying as discernible from electioneering.[27] While conceding the legitimacy of grassroots

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[27]Franklin considers grassroots lobbying as "for the most part" a subcategory of issue advocacy. JA 177. Franklin agrees that organizations that want to influence government policy often engage in grassroots lobbying, JA 180, and do so as a means to influence current office holders and how they vote in Congress. Record 81-2:215 (Franklin Dep. 43:3). Franklin agrees that communications that have three elements – they relate to specific legislation, reflect a point of view on the legislation's merits, and encourage the general public to contact legislators – "appear within grassroots lobbying," JA 178, 206, and offers that a definition should include "efforts to mobilize supporters" and "efforts to persuade the public" on a specific issue as grassroots lobbying as well. Record 81-2:214 (Franklin Dep. at 37:9-11). According to Franklin, a significant number of the ads in the spring of 2005 for and against judicial filibusters were designed to affect

lobbying advertisements, these experts drew broad conclusions about the admittedly unintended effects of such ads. *See* Record 81:38 (*FEC Mem. Supp. S.J.* at 30) (Experts "provided unrebutted testimony that, regardless of WRTL's effort to avoid overt electioneering in the actual ad text, WRTL's ads would likely have influenced the election if broadcast during the 2004 electioneering communication periods.").

But the district court found no practical or legal basis for accepting the "highly questionable assumption" that the "speculative conjecture" of such experts "can actually project the 'likely' impact of a given ad on the electoral process." JS App. 19a-20a. Among the experts' conjectures were that WRTL's grassroots lobbying would have had an electoral effect because of circumstances external to the ads or WRTL's plans, that any communication (regardless of mode or whether it even mentions a candidate) can have an electoral effect, and that the less a communication resembles express advocacy, the more effective it is as an electioneering communication.

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or influence the vote in the Senate on the filibuster issue, while some may have been more aimed at public opinion generally. Those ads that were directed or aimed at influencing the vote in the Senate mentioned a specific senator by name, pointed to his or her role in the debate, and were broadcasted primarily in the states where those senators were from. JA 174.

Douglas L. Bailey admits that groups can do grassroots lobbying, which he calls "public lobbying advertising," JA 139, when the position of an officeholder is undecided, JA 148, that it is customarily done when a bill or issue is before Congress, *id.* 142, that "increasingly" such ads mention the names of officeholders to be lobbied, generally in order to enable the public "to weigh in with" an undecided officeholder or to sway her position, *id.*; that they are targeted to districts or states, *id.*; and that WRTL's 2004 ads were public lobbying advertising. JA 151 (exhibits 5, 6 and 7 were scripts of the three 2004 ads). Bailey also acknowledged that the PBA ad was public policy advertising, JA 150-51 (Exhibit GIA 6 was the PBA Ad), and that the 2006 Filibuster Radio Ad concerning the Alito nomination filibuster was public policy advertising. JA 156 (Exhibit 9 was the 2006 Filibuster Radio Ad). Bailey acknowledged that public lobbying advertising "can be" successful in persuading a public official to change his position, adding that "[g]enerally, frankly, it's not, but it can be." JA 152.

Franklin could not determine that any given ad was intended to or would in fact affect an election.[28] He believes that the effect of grassroots lobbying on an election depends in large part on characteristics of the voters' attentiveness to politics and their predispositions, partisan or ideological. JA 191, and that if an ad is not countered by an opposing view, it is more likely that its message "will have a net effect on public opinion or vote choice." JA 207. In Franklin's opinion, the press releases of state Senator Bob Welch and comments of two other candidates and the Wisconsin State Republican Chairman, as reported in a news articles, made the subject of judicial nominations a "partisan issue." JA 226-27. He believes that the net effect of grassroots lobbying depends on the "baseline" or "salience" established by earlier communications. JA 175. He testified that if "issues are linked to the considerations" that voters have on their mind when going to vote, "then that topic or issue is likely to have a greater impact on their voting choice than if it is not salient to them at the moment." Record 81-2:223 (Franklin Dep. at 78:10-17). So under his view, regardless of a communication's content or medium, or whether it mentions a candidate, a speaker must ascertain the opposition to his

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[28] According to Franklin, the effect of grassroots lobbying "would depend in part on the setting and the nature of the effort," JA 206, and "one can imagine the same elements being literally present in one context and having a very different impact or effect or purpose than having the same elements in another." *Id.* A fair summary of his report is that "the discussion of public policy issues can affect an election." JA 185. He offered that any communication to the public through any means can affect an election: telemarketing, phone calls, newspaper advertising, direct mail, web site information, radio and television advertising, even radio talk shows or news broadcasts, even when not mentioning a candidate or officeholder, can have an electoral impact, JA 186-87, but "[w]ithout empirical research, it's difficult to say how much [effect] any one of [these communications] would [have]."). JA 187. Franklin offered that a communication has an electoral effect or "electorally relevant impact" whenever it "deals with politically relevant issues," JA 187, and that a sincere intent to affect a policy position can still have an "overt . . . electioneering consequence." JA 210.

message and ascertain the voters' predispositions and how salient the issue he wishes to address has become to them in order to gauge whether his communication is electorally effective and therefore regulable.

In the opinion of Bailey, the other defense witness, an issue ad is "something that is hopefully going to have an impact on issues," JA 133. He believes that campaign ads include ads that do not mention the names of candidates, JA 134, and "an issue ad run in a campaign is a campaign ad," JA 133, because "[a]nything that happens in the course of a campaign . . . potentially has some impact on the campaign so that any ad run that relates to candidates or the issues in a campaign is going to have some impact on the campaign." JA 134. *See also* JA 132, 133 (campaign ad and issue ad can be the same thing), 157 ("ads that raise issues in relation to candidates . . . are putting in the minds of the voters, candidates and issues which potentially has an impact on elections, so it becomes a campaign ad."). He said that the "timing, . . . content and . . . obvious intent" of WRTL's Waiting Ad "obviously" made it a campaign ad, JA 148-49, despite agreeing that it (a) referenced a specific current legislative matter, JA 154, (b) only "implied" the Senators' position on the issue, and (c) was consistent with the possibility that one or both Senators were undecided, JA 148, (d) did not identify the Senators as candidates, JA 155, (e) contained no reference to Sen. Feingold's character, qualifications or fitness for office, JA 155, and (f) contained no words that promoted, supported, attacked or opposed him. JA 156.

In Bailey's view, six ads found to be genuine issue advocacy in the *McConnell* litigation,[29] which included the PBA Ad,

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[29]The six ads, herein referred to as the "genuine issue ads" or "GIA" ads, were identified in the report of *McConnell* Intervenor Defendants' expert, Kenneth M. Goldstein, as "Genuine Issue Ads" (defined by Goldstein as "ads coded as providing information or urging action"as opposed to "Electioneering Ads," defined as "generating support or opposition for a particular candidate"), Amended Expert Report of Kenneth M. Goldstein on Behalf of Intervenor Defendants at 7. The six ads were considered genuine

were "all campaign ads" and would "inevitably . . . have some impact, maybe a little, maybe a lot, on an election . . . ." JA 145;159-67. He found that WRTL's ads "are probably more effective campaign ads" than the *McConnell* genuine issue ads because WRTL's ads "are not so obvious" and "are a little more subtle." JA 146.

Bailey was then presented with the sham Yellowtail Ad, Record 76:6, taken from *McConnell*, 540 U.S. at 193, n.78. JA 152. He concluded that, compared to the Yellowtail Ad, WRTL's Waiting Ad is "subtle[,] [i]mplies the position of the candidates . . . and is, therefore, more likely to be an effective . . . campaign communication." JA 154. The fact that the Waiting Ad referenced a specific legislative matter and urged contact with the referenced candidate to take a particular position on the matter while the Yellowtail Ad did not refer to any legislative matter and contained references to the character and integrity of the candidate led Mr. Bailey to opine that "I think that [the Waiting Ad] is a more effective campaign ad." JA 154. On a moment's reflection, these statements yield the remarkable proposition that, according to Bailey, the less an ad is like express advocacy, the more it is the functional equivalent of express advocacy and regulable. This stands *McConnell*'s narrow-tailoring functional equivalence test on its head.

The district court held the prohibition unconstitutional as applied to the three WRTL ads. JS App. 29a. While the court listed five factual topics that it would "at a minimum" examine "within the four corners of" an ad, JS App. 22a, those five topics were not in any way a general test. While the focus was on the four corners, there was a *relevant context* that was before the court.[30] Instead, the court found that: "the common denomi-

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issue ads by Goldstein's coders and he decided they were genuine issue ads. *McConnell*, 251 F. Supp. at 747-48 (opinion of Judge Kollar-Kotelly).

[30]The ***relevant context*** consists of the elements of the "electioneering communication" definition and prohibition, i.e., whether (a) the public official named is a candidate, (b) the communicator is a corporation (or union),

nator between express advocacy and its functional equivalent, as the Supreme Court defined it in *McConnell*, is the *link* between the words and images used in the ad and the fitness, or lack thereof, of the candidate for public office." JS App. 27a (emphasis added). "[T]he absence of that link . . . enables an issue ad to be fairly regarded as a genuine issue ad." *Id.* The district court's test focused on identifying genuine issue ads, of which grassroots lobbying is a subcategory with the additional constitutional protection of the right to petition.

During the prohibition period before the fall 2006 Wisconsin elections, WRTL sought another preliminary injunction to broadcast another grassroots lobbying ad. The "CCPA Ad" asked Wisconsin citizens to call Senators Kohl and Feingold about helping to finalize enactment of the Child Custody Protection Act (which had passed by wide margins in both houses but was then stalled by parliamentary maneuvering before finalization). That time Sen. Kohl was a candidate. This ad clearly stated the record of the candidates on the issue as follows: "Fortunately, Senator Kohl voted for the rights of parents. But, sadly, Senator Feingold did not." *See* Bopp & Coleson, *Distinguishing* at 404 ("CCPA Ad" in Appendix) (emphasis in original). A preliminary injunction was denied and the district court declined to consider the ad along with the three anti-filibuster ads that it considered in the opinion now before this Court. Given the denial of WRTL's request to consider the ads together, WRTL filed another summary judgment motion as to the CCPA Ad, but the defendants have insisted to the court that they must have another round of intent-and-effect discovery of WRTL before they can proceed to respond. Record

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(c) the ad is broadcast, (d) the ad is targeted, and (e) the ad is broadcast within a prohibition period. In addition, as to grassroots lobbying there is the question of whether the communication concerns a current legislative or executive branch matter. The district court treated these relevant context facts as given, on the facts of this case, and so did not discuss them. By its "four corners" statement it indicated its rejection (on both practical and constitutional grounds) of any intent-and-effect context.

132:5. The court has not ruled on their motion.

SUMMARY OF THE ARGUMENT

While WRTL has forever lost the opportunity to broadcast its 2004 grassroots lobbying ads, it seeks recognition of constitutional protection for its ads so that the next opportunity will not be lost as well. This case is well within the exception to mootness because there is a reasonable likelihood that WRTL will again want to broadcast grassroots lobbying ads that qualify as electioneering communications. The experiences of this case and *CCLM* (06-589) demonstrate that such cases will evade review. The short-notice nature of grassroots lobbying makes it certain.

Appellants and their amici seek to shift the burden to WRTL to justify its ads. But the strict scrutiny burden is on the government because paying for grassroots lobbying from a PAC, or communicating with less effective means at less effective times, is a heavy burden on the right of the sovereign people to participate in self-government through their liberties of expression, association, and petition. Precedent specifically requires strict-scrutiny justification in such circumstances. *McConnell* employed strict scrutiny by (1) stating that the corporate-form interest is compelling as to restricting corporate express advocacy and (2) doing narrow tailoring by stating that sham ads were "the functional equivalent of express advocacy." But *McConnell* recognized that this analysis "might not apply to the regulation of genuine issue ads."

Strict scrutiny requires that the prohibition is narrowly tailored, in the least restrictive manner, to a compelling interest. However, WRTL's grass roots lobbying ads are not the "functional equivalent of express advocacy," because they are materially identical to the PBA ad, identified in *McConnell* as a genuine issue ad. Furthermore, grass roots lobbying has only a remote and speculative effect on elections and corporations have an independent First Amendment right to engage in such communications.

Furthermore, there are two less restrictive means that Congress could have employed, so that the prohibition fails strict scrutiny. One would be to require that electioneering communications be funded from a separate bank account (with no corporate funds) instead of from a PAC. WRTL offered to funds its ads from such an account, which would have eliminated the corporate-form interest. A second less restrictive means would be a test distinguishing grassroots lobbying that is not functionally equivalent to express advocacy.

Alternatively, the facial upholding of the prohibition in *McConnell* should be overturned because (1) the FEC and Intervenors contend that WRTL's genuine issue ads are in the "heartland" or "core" of what Congress intended to eliminate with the prohibition and (2) the experiences of this case and *CCLM* (No. 06-589) have demonstrated that as-applied challenges are an inadequate remedy to protect genuine issue ads

ARGUMENT

I. This Case Is Within the Mootness Exception.

The FEC claims that the 2004 ads are moot and not "'capable of repetition, yet evading review.'" *See* FEC Br. at 21 (citation omitted).[31] WRTL set the answer to this assertion before the Court in *WRTL I*, so that the issue was before this Court when it considered the case in January 2006. *See* Jur. Stmt. at 7 & nn.2 & 3; Br. of Appellant at 9 n.8, *WRTL I*, 546 U.S. 410 (No. 04-1581). Since "the case or controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate," FEC Br. at 21, this issue was before this Court in January 2006, long after the facts that the

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[31]In the district court, both Appellants claimed that this controversy was neither capable of repetition nor would evade review. JS App. 11a-12a. In April 2006, when asked to address mootness, the FEC characterized the issue as "a close question," Record 73:3 (*FEC Resp. Court's Apr. 17 2006 Order* at 3), while the Intervenors insisted that the controversy failed both prongs. Now the Intervenors concede justiciability, Intervenors' Br. at 13 n.7, and the FEC asserts mootness. FEC Br. at 24.

FEC now claims prove this controversy moot. *See* FEC Br. at 23-24. After remand, with the benefit of full briefing on the question, the district court ruled that WRTL's "predicament" was "a classic example of [this] well-established exception to the mootness doctrine." JS App. 12a.

As to "evading review," the relevant period has *proved* to be a "wholly unrealistic" window in which to reach final resolution of an as-applied challenge to the electioneering communication prohibition. JS App. 13a. This negates Appellants' contention that "[t]here is no reason to assume" that the controversy's recurrence will not evade review. FEC Br. at 24 n.6. Nor is presuming that a suit could be brought "well in advance" of the prohibition period warranted. *Id.* In fact, the controversy will likely *only* arise when it cannot be fully reviewed. As the district court pointed out,"legislation typically arises in the 30- and 60-day periods before a federal primary or general election." JS App. 15a (*citing McConnell*, 251 F. Supp. 2d at 793 (Leon, J.)). As-applied challenges[32] to the prohibition will therefore be brought on an emergency basis during the closing days of a campaign. *Id.* at 18a,19a. This case was filed before the electioneering communication prohibition period in 2004. Despite statutorily-required expedition "to the greatest extent possible," BCRA § 403(a)(4),[33] "[WRTL's] claims have

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[32]"The 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks." *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974). It is "appropriate" because "[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." *Id.*

[33]As of January, 2007, challenges to BCRA's provisions can be brought in district courts other than the District of Columbia's, and the expedition requirement applies only to those actions plaintiffs elect to bring in the District of Columbia. BCRA § 403(a) & (d), 116 Stat. 113-114. Accordingly, for those cases brought outside the District, the statutory expedition,

yet to be 'fully litigated.'" *Id.* at 13a. The two-year election cycle has "proved too short a period of time for appell[ee] to obtain complete judicial review, and there is every reason to believe that any future suit would take at least as long." *Bellotti*, 435 U.S. at 774. So "it is entirely unreasonable, if not fanciful, to expect that a plaintiff could have obtained complete judicial review of its claims in time for it to air its ads during the 30 and 60-day . . . [prohibition period]," JS App. 13a, and "a decision allowing the desired expenditures would be an empty gesture unless it afforded appellants sufficient opportunity prior to the election date to communicate their views effectively." *Bellotti*, 435 U.S. at 774.[34]

As to "capable of repetition," this case readily fits within the exception to mootness because there is a "'reasonable expectation' . . . that the same *controversy* will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (emphasis added) (*quoting Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). The FEC misstates what "similar factual circumstances," *Bellotti*, 435 U.S. at 774, must be shown to be reasonably expected to recur, and ignores record evidence establishing that the relevant

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as insufficient as it has proved here, is not even required.

[34]To suggest, as the FEC does, that plaintiffs could obtain full review by forgoing a preenforcement challenge and instead subject themselves to enforcement actions and risk criminal prosecution, FEC Br. 24 n.6, flies in the face of the preenforcement doctrine. This Court has held repeatedly "[w]hen contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (*quoting Steffel v. Thompson*, 415 U.S. 459, 459 (1974)). "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Id.* at 298 (*quoting Doe v. Bolton*, 410 U.S. 179, 188 (1973)).

factual circumstances will likely recur. The same controversy will arise when WRTL will again be subject to the "electioneering communication" prohibition when it needs to engage in grassroots lobbying, because then it "*will again be subjected to the alleged illegality.*" *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (emphasis added). *See also Bellotti*, 435 U.S. at 774-75 (holding the capable of repetition prong satisfied where there was "no serious doubt that there is a 'reasonable expectation' that appellants again *will be subject to the threat of prosecution*" under the challenged law (emphasis added) (*quoting Weinstein*, 423 U.S. at 149)). The controversy will recur when the alleged illegality—an unconstitutional application of the prohibition and the coinciding threat of prosecution—recurs. The alleged illegal action will recur when WRTL wishes to run a targeted broadcast ad mentioning a candidate within the prohibition period, regardless of whether such an ad shares "the five characteristics that the district court found dispositive in sustaining [WRTL's] as-applied challenge." FEC Br. at 24. As in *Bellotti*, it is uncontroverted that the situation giving rise to the need to violate the prohibition will regularly recur. 435 U.S. at 774-76.[35] Legislative issues will typically arise in the prohibition period. JS App. 15a. WRTL intends to run materially similar grass-roots lobbying ads during those periods as necessary, and WRTL is concerned about a range of issues that

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[35]As was the case in *Bellotti*, "there is no reason to believe that the [enforcing agency] will refrain from prosecuting violations of [the prohibition]." 435 U.S. at 775. The prohibition is plainly applicable to the 2004 Ads and any "targeted" broadcast ad aired during the prohibition periods. There are no regulatory exceptions to the electioneering communication prohibition for grassroots lobbying, and WRTL "is subject to litigation challenging the legality of [its] actions if contrary to the Commission's rule" by a private party and without an FEC enforcement decision." *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (noting that 2 U.S.C. § 437g(a)(8) so provides). "Meanwhile, [the prohibition] remains on the books as a complete prohibition of corporate expenditures" for grassroots lobbying during the prohibition period, and "the effect of the statute on arguably protected speech will persist." *Bellotti*, 435 U.S. at 775.

regularly have and will become issues in the legislative and executive branch. Record 30 (*AVC* ¶ 16)[36] The relevant facts are capable of repetition and, therefore, the exception applies.[37]

II. Strict Scrutiny Applies.

Appellants and their amici attempt to shift their strict scrutiny burden to WRTL.[38] But this case involves a *prohibition*[39] that substantially burdens the people's rights to self-government using their liberties of expression, association, and petition. A politician who chooses to run for reelection wears two hats, the hat of office as the people's representative and servant and the campaign hat. Government continues to function during elections, and where a law burdens the people's right to participate in that government by petitioning the

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[36]Availability of PAC funds does not control the capable of repetition prong because WRTL challenges the very necessity of using them.

[37]The district court's reliance on "election-related challenges in which [the capable of repetition, yet evading review] exception was applied," JS App. 12a, is not misplaced. Controversies over "*electoral processes*," FEC Br. at 24, recur because electoral processes are part of *elections*, and elections recur. The transferable concept is that a process or activity inherently surrounding an election will recur. The controversy here will recur because elections, without which there is no prohibition period, will recur. In other words, if the controversy recurs at all, it will be in proximity to an election, and elections undeniably recur.

[38]*See, e.g.*, FEC Br. at 19, 28, 32-35; Intervenors' Br. at 30 (WRTL must prove PAC-option inadequate), 39 (WRTL must show "no reasonable prospect the ad is likely to influence the election," i.e., "differen[ce] in *kind*" (emphasis in original); Brifault & Hasen A.C. Br. at 24 (WRTL must "prove[] that the communication is unlikely to have any appreciable effect on voter's choices"); Dorsen et al. A.C. Br. at 13 (four elements of electioneering definition "satisf[y] government's burden [as to] purpose and perceived effect" so burden shifted to WRTL).

[39]WRTL did not challenge the electioneering communication *disclosure* requirements. *See supra* at n.18. But Appellants' amici curiae League of Women Voters et al. erroneously believe that this case is about *disclosure*. LWV et al. A.C. Br. at 14 ("all without disclosure"), 18 (same).

incumbent, the government bears the strict-scrutiny burden.

A. *Self-Government Right.* The prohibition burdens the self-government rights of the people. The people are sovereign. U.S. Const. preamble; *Buckley*, 424 U.S. at 14 ("In a republic . . . the people are sovereign . . . ."). In a constitutional republic, government is restricted to the powers expressly granted by the people. U.S. Const. amend. X. The people created legislators to represent them, U.S. Const. art. I, § 1; art. IV, § 4, and amended the Constitution to elect Senators directly. U.S. Const. amend. XVII. They mandated Congress not to restrict the peoples' rights to speak, associate,[40] and petition in exercising their sovereign rights. U.S. Const. amend. I.

B. *Expression Right.* The First Amendment is designed "'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley,* 424 U.S. at 14 (*quoting Roth v. United States,* 354 U.S. 476, 484 (1957)). "'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *Bellotti*, 435 U.S. at 777 n.12 (citation omitted). "It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 777.

C. *Expressive Association Right.* While the individuals who make up WRTL could engage in electioneering communication, 2 U.S.C. § 434(f) (requiring only disclosure if spending exceeds $10,000 in a calendar year), when they form themselves into an effective advocacy group for lobbying, their lobbying through broadcast ads is prohibited for some 90 days during an election year.[41] Citizen groups formed under the right

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[40]"[T]he First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas . . . ." *Buckley*, 424 U.S. at 16 (citations and quotation indicators omitted).

[41]The true temporal and geographic effect of the prohibition is broader than may first appear. *See* Bradley A. Smith & Jason Robert Owen, *Bound-*

of association are an essential component of democracy in action. In *Buckley*, this Court reaffirmed the constitutional protection for association: "[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. [Consequently,] the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas." *Buckley*, 424 U.S. at 15."[A]ction which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 25.[42] This highest level of constitutional protection flows from the essential function of associations in allowing effective participation in our democratic republic by amplifying individual speech. *Id.* at 22.

D. *Petition Right.* Grassroots lobbying is also protected by a right not considered in *McConnell*, i.e., the right to petition. The right to petition is "one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (*quoting United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967)). Grassroots lobbying is a quintessential exercise of the right to petition. *Eastern R.R. President Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961); *Liberty Lobby, Inc. v. Pearson*, 390 F. 2d 489, 491 (D.C. Cir. 1968). The right

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ary Based Restrictions in Unbounded Broadcast Media Markets: McConnell v. FEC's Underinclusive Overbreadth Analysis, 20 Stan. L. & Pol'y Rev. 101 (2007).

[42]When only an associational interest is involved, as with limits on cash contributions to candidates, the government need only demonstrate that the "contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'" *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000). But when speech is limited, as here, the statute is subject to strict scrutiny, requiring the government to demonstrate that the regulation is narrowly tailored to advance a compelling governmental interest, *Buckley*, 424 U.S. at 64-65, the standard employed for expressive association. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Boy Scouts of America v. Dale*, 530 U.S. 640, 657-59 (2001).

of corporations to petition both the legislative and executive branches was recognized in *Noerr*, 365 U.S. at 135. This Court held that attempts to influence the passage or enforcement of laws were constitutionally protected, essential to representative government, and could not be a violation of the Sherman Act:

> In a representative democracy such as this, these [legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. . . . The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 137-38. *See also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("the right to petition extends to all departments of the government"). In *Bellotti*, 435 U.S. 765, this Court applied the right of petition to corporations which sought "to publicize their views on a proposed constitutional amendment . . . to be submitted . . . as a ballot question," *id.* at 769, holding that it was constitutionally protected. *Id.* at 776-78, 790-96. *Bellotti* noted that "the First Amendment protects the right of corporations to petition legislative and administrative bodies," and concluded that "there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity." *Id.* at 791 n.31. And as general advocacy of public issues, grassroots lobbying is protected under the First Amendment as part of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times*, 376 U.S. at 270.

The government bears the burden of justifying statutes that target speech based on its content—especially speech at the core of our constitutional system of government—under the strict-scrutiny test. *See, e.g., Buckley*, 424 U.S. at 39, 44-45 ("exact-

ing scrutiny"); *FEC v. National Conservative PAC*, 470 U.S. 480, 496 (1985). "Under the strict-scrutiny test, [the government has] the burden to prove that the [challenged provision] is (1) narrowly tailored, to serve (2) a compelling state interest. *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002) (*quoting Brown v. Hartlage*, 456 U.S. 45, 54 (1982), and *citing Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222 (1989)). "In order to show that a given statute is narrowly tailored, the State must demonstrate that it does not "unnecessarily circumscrib[e] protected expression," *id.*, so that it is the least restrictive means to further a compelling interest. *See*, *MCFL*, 470 U.S. at 262 ("interest . . . can be met in a manner less restrictive").

E. *PAC Mandates Trigger Strict Scrutiny.* Specifically, where the government imposes a PAC mandate, as does the electioneering communication prohibition, the government bears the strict scrutiny burden of justifying this infringement on the peoples' liberty. The PAC-option is a serious burden and is inadequate, constitutionally and factually, as a means for communications that do not contain express advocacy or its functional equivalent.[43] In fact, where a corporation must use

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[43]*McConnell* held that the PAC-option "provide[s] corporations and unions with a constitutionally sufficient opportunity to engage in *express advocacy*," 540 U.S. at 203 (emphasis added), but *McConnell* never held that "genuine issue advocacy" is express advocacy, indicating rather by its substantial overbreadth analysis that the prohibition was facially constitutional because it did not sweep in a "substantial" number of "genuine issue ads." *Id.* at 205-07. In *MCFL* , this Court said that the PAC-option was not adequate with respect to independent expenditures (containing express advocacy) for *MCFL*-type corporations and catalogued some of the burdens inherent in PAC funding. *MCFL*, 479 U.S. at 252-55. Justice O'Connor concurred, highlighting especially the PAC-option burdens on MCFL. *Id.* at 265 (O'Connor, J., concurring). In *MCFL*, the FEC clearly had the strict-scrutiny burden and advanced three interests that the Court rejected as not compelling or which could be met with less-restrictive, more narrowly-tailored means. *Id.* at 256 (corporate-form interest), 260 (protecting donors), and ("massive undisclosed spending" and "conduits" necessitating a "bright-

PAC funds for grassroots lobbying there is a tax on the expenditure.[44] And on the facts of this case, the PAC alternative was inadequate. WRTL had only a limited time to engage in grassroots lobbying in favor of an up-or-down vote on judicial nominees. A lost opportunity at the critical time is an opportunity lost forever. These were highly important matters to WRTL and its members, not "mere" theoretical deprivations of First Amendment rights to speak on matters of public concern. When a legislative issue arises on short notice, as here, there is no time for corporations without a PAC to organize one, go through the time-consuming, cumbersome process of first acquiring FECA-compliant "members" (who must fit certain criteria to qualify for solicitation and may not be solicited for PAC money until they respond to a prior solicitation to become members of the organization and the organization responds indicating acceptance)[45] and then raise PAC money from the

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line rule").

[44]The expenditure for a grassroots lobbying electioneering communication done by a PAC is subject to tax (at the highest rate). *See* IRS Rev. Rul 2004-6, 26 U.S.C. § 527. If the PAC does enough lobbying that lobbying becomes its major purpose, the PAC loses its tax exempt status and its connected corporation must pay a tax on all of the PACs expenditures (at the highest rate). Moreover, communications attributed to a PAC may not be distributed in churches, as doing so would affect their nonprofit status under federal law. 26 C.F.R. § 1.501(c)(3)-1(a)(i), 26 C.F.R. § 1.501(c)(3)-1(a)(ii)).

[45]A "membership corporation," 11 C.F.R. § 114.1(e)(1), such as WRTL, may not solicit contributions to its PAC from non-members (unless they are "executive or administrative personnel, and their families"). 11 C.F.R. § 114.7(a). To acquire "members," a membership corporation must comply with 11 C.F.R. § 114.1(e)(1), i.e., have a prescribed organizational structure, have prescribed language in its organic documents, "expressly solicit[] persons to become members," and "expressly acknowledge[] the acceptance of membership," and comply with § 114.1(e)(2), i.e., the member must have "some significant financial attachment to the membership organization" (described), or "pay membership dues at least annually," or "have a significant organizational attachment to the membership organization" (described). While a membership corporation may solicit members as

members through the multiple appeals required for fundraising. Record 76, Attachment 1:5 (Lyons Affid. ¶ 9). Nonprofit corporations organized under IRC § 501(c)(3) are not permitted to have a PAC. Where a corporation has a PAC, the PAC alternative is untenable where there is inadequate time to raise sufficient funds by appeals to existing members through the multi-step process of recruiting new members and then soliciting statutorily-limited contributions. *See supra* at n.46. The PAC requirement in such situations is a complete ban. But the presence or absence of PAC funds does not alter the fact that requiring the PAC-option mandates strict scrutiny, as this Court decided in *Austin*, noting that the Michigan Chamber of Commerce had raised substantial PAC funds but still mandating strict scrutiny. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658 (1990).

F. *McConnell* Employed Strict Scrutiny. Where a First Amendment facial overbreadth challenge is brought, this Court still requires a compelling interest and narrow tailoring. *McConnell* employed the strict-scrutiny analysis by first setting out the only compelling interest that justifies a *prohibition*, i.e., the corporate-form interest (only corporations are prohibited from paying for electioneering communications, as are unions for parity). *See* 540 U.S. at 205. The narrow tailoring analysis was done by analogy, which began by framing the corporate-form interest as an interest in regulating express advocacy, *id.* then stated the issue as whether "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications." *Id.* at 206. The Court held that this "argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *Id.* Only at this point did the Court begin the

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desired, other corporations may only solicit their employees for a PAC contribution twice a year. 11 C.F.R. § 114.6.

overbreadth analysis, holding that plaintiffs failed to prove that the prohibition reached a substantial number of "genuine issue ads" as compared to the sham ads that were the "functional equivalent of express advocacy." *Id.* at 206-207. *McConnell* decided only a facial challenge to the prohibition so that no as-applied issues could have been resolved, and the Court held in *WRTL I*, 546 U.S. 410 (2006), that neither the language nor the logic of *McConnell* precluded a challenge to the prohibition as applied to grassroots lobbying. *McConnell* did not recognize that the government had met its strict-scrutiny burden as applied to the "genuine issue ads" that *McConnell* recognized. *See* 540 U.S. at 206 & n.88.

G. McConnell Did Not Create an Intent-and-Effect Test. The centerpiece of Appellants' argument is that *McConnell* approved an intent-and-effect test warranting a broad contextual investigation into the speaker's alleged true purpose. FEC Br. at 43; Intervenors' Br. at 21.[46] Their approach treats the actual text of the communication as essentially irrelevant. It is an empty vessel into which they pour discovered intent from an external context that is often beyond the speaker's control or even knowledge.[47] As shall be shown, the external context they

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[46]The Intervenors actually engaged in prestidigitation to make it appear that *McConnell* employed an intent-and-effect test instead of a functional-equivalence narrow-tailoring analysis by cut-and-paste rearrangement of what this Court actually said in *McConnell*. *See* Intervenors' Br. at 2, 9, 19 (substituting *McConnell*s intent-and-effect language where the functional equivalence language belongs in an apparent effort to substitute an intent-and-effect test for the functional-equivalence narrow-tailoring analysis). Where Intervenors do speak of functional equivalence, they repeatedly precede it with "likely," *see, e.g., id.* at 23 ("likely to function as express advocacy"), trying to substitute the weaker idea of "likely" functional equivalence for *McConnell*'s more demanding concept: "*are* the functional equivalent of express advocacy." 540 U.S. at 206 (emphasis added).

[47]If the application of the prohibition to a communication depends on the results of an external intent-and-effect investigation, then the prohibition is unconstitutionally vague as applied. No one could know when speech is protected. It should also be noted that the FEC in *WRTL I* expressly

urge is statutorily and constitutionally non-cognizable. But for present, note that *McConnell* created no intent-and-effect test.

It is, of course, true that after establishing functional equivalence as its narrow-tailoring analysis *McConnell* went on to say, "The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." 540 U.S. at 206. This intent-and-effect language was merely descriptive of the sham ads that had just been declared to be "the functional equivalent of express advocacy" and is not (nor could it be) a constitutionally-permissible test in and of itself. The district court correctly held that the proper functional equivalence analysis is limited to "consideration [of] language within the four corners of the . . . ads." JS App. 22a.[48] It said that an intent-and-effect test is "practically unacceptable because as-applied challenges . . . must be conducted during the expedited circumstances of the closing days of a campaign when litigating contextual framework issues and expert testimony analysis is simply not workable." JS App.19a. "More importantly," the court added, "it is theoretically unacceptable because it proceeds on the highly questionable assumptions that: (1) any subjective intent to affect the election, regardless of its degree of importance, should negate an otherwise genuine issue ad; and (2) . . . experts can *actually* project the 'likely' impact of a given ad on the electoral process." JS App. 19a-20a.[49] It wrote that the Supreme Court had already recognized

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eschewed an intent test. Br. for Appellee at 39, *WRTL I*, 546 U.S. 410 (No. 04-1581) ("A constitutional standard that turned on the subjective sincerity of a speaker's message would likely be incapable of workable application; at a minimum, it would invite costly, fact-dependent litigation.").

[48]There is, of course, the relevant context of the elements of an electioneering communication and whether the communication focuses on a current legislative or executive branch matter. *See supra* n.30.

[49]The district court expressed skepticism about expert prognostication after considering the efforts of two defense experts in this case. JS App. 19a-

that "delving into a speaker's subjective intent is both dangerous and undesirable when First Amendment freedoms are at stake." JS App. 20a. The district court pointed to the Supreme Court's rejection of an intent-and-effect test in *Buckley*, 424 U.S. at 43 (*citing* with approval *Thomas*, 323 U.S. at 535). JS App. 20a-21a.

McConnell did not purport in any way to overrule *Buckley* on this point, which is central to free expression, by referring to "intent" and "effect." 540 U.S. at 206. *McConnell* had already specifically connected this "intent" language to the sham "Yellowtail Ad" as being an ad "no less clearly intended to influence the election" than an express advocacy ad. 540 U.S. at 193 & n.78. So it was not creating a new "intent and effect" test for determining whether a communication is "the functional equivalent of express advocacy."

Rather, *McConnell* was simply citing language used by defense expert Kenneth Goldstein, who used student coders to separate ads provided to them into the categories of "Genuine Issue Ads" or "Electioneering Ads." *Amended Expert Report of Kenneth M. Goldstein on Behalf of Intervenor Defendants* at 24, *McConnell*, 251 F. Supp. 2d 176, 2002 WL 33100340 (No. 02-581 and consolidated cases).[50] "Specifically, coders were asked whether the purpose of the ad was to 'generate support or opposition for candidate,' or to 'provide information or urge action.'" *Id.* at n.20. Based on the coders' perceptions and his analysis, Goldstein argued "that BCRA's definition of Electioneering Communications accurately captures those ads that *have the purpose or effect of supporting candidates for election to office*." *Id.* at 26 (emphasis added). *McConnell* was plainly echoing that conclusion for purposes of its broad-brush facial-

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20a, *See supra* at 18-22 (discussing experts' opinions).

[50]Goldstein's report, as presented to this Court in Vol III of the Joint Appendix is available at http://www.law.stanford.edu/publications/ projects/campaignfinance/. In this Court's *McConnell* records, the report was in Defendants' Exhibits, Vol. 3, Tab 7.

challenge analysis as a mere description of those ads that were the "functional equivalent of express advocacy," not creating a new and constitutionally problematic test based on criteria this Court had already rejected.

Moreover, *McConnell*'s expert-endorsed PBA Ad, *infra* at n.65, was declared a "genuine issue ad" based on its content, not contextual probing into intent and effect. The same was true of all the ads coded by Dr. Goldstein's student coders for the *Buying Time* studies that were central to the *McConnell* evidence. *See, e.g.*, *McConnell*, 251 F. Supp. 2d at 307 (Henderson, J.) ("The students were asked to 'code' the ads based on their content."). And the Prime Sponsors Rule, a grassroots lobbying exemption rule proposed to the FEC in 2002 by Senators McCain and Feingold and other prime BCRA sponsors, likewise examined the four corners of a communication and required no contextual investigation into intent and effect. *See* Bopp & Coleson, *Distinguishing* at 407-08 (Appendix). So based on practicality, constitutional imperative, and the Appellants' failed effort to prove cognizable intent and effect through discovery and expert testimony, the district court rightly rejected any reliance on an intent-and-effect test to distinguish genuine from sham issue ads.

H. *McConnell Did Not Shift the Burden of Proof.* Another effort to shift the burden to WRTL attempts to extract from *McConnell*'s facial overbreadth analysis (i.e., how substantial was the prohibition's impingement on "genuine issue ads") a rule governing as-applied challenges (which were not at issue and not the topic).[51] The locus of this argument is *McConnell*'s statement about how substantial the prohibition of genuine issue

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[51]It should be recalled that the FEC and intervenors in *McConnell* urged the Court not to consider any as-applied challenges in that facial challenge, and then the FEC insisted in *WRTL I* that no as-applied challenges were permitted, which the Chief Justice termed "a classic bait and switch." Transcript of Oral Arg. at 25, *WRTL I*, 546 U.S. 410 (No. 04-1581). So *McConnell* could not have decided as-applied challenges, and especially not in the midst of a *facial substantial overbreadth* analysis.

ads might be in the future: "Moreover, whatever the *precise percentage* may have been in the past, in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U.S. at 206 (emphasis added).

The reference to "precise percentage" at the beginning of this sentence (often excluded by those attempting to convert this facial overbreadth analysis into an as-applied statement) indicates that this sentence is about the facial challenge question of how substantial was the alleged overbreadth. This sentence, within the discussion of just how many genuine issue ads were captured by the prohibition as compared to sham issue ads, began by noting that "[t]he *precise percentage* of issue ads that clearly identified a candidate and were aired during those relatively brief preelection time spans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court." *id.* (emphasis added), and concluded that the "*vast majority*" of ads were not genuine issue ads. *Id.* (emphasis added). The italicized words about "percentage" and "majority" clearly indicate that the "in the future" comment was *only* about the substantiality of the alleged overbreadth. It could not have been about future as-applied challenges in any event, because neither future cases nor as-applied challenges were before the Court.

So the "in the future" comment, in context, was about lack of overbreadth in the future. The Court was considering the "percentage" of "genuine issue ads" that would be captured by the prohibition (as compared to the "sham issue ads" that *McConnell* recognized were the intended target of the prohibition) in order to determine whether the overbreadth was sufficiently broad for facial invalidation. After noting that the experts had fought over the "precise percentage," the Court declared that prospectively the overbreadth could be reduced in any event because, with knowledge of the prohibition, speakers

could take measures to avoid the prohibition's reach in some situations.[52] But this "in the future" statement could not apply to *all* situations because the Court immediately left open as-applied challenges by recognizing the category of "genuine issue ads" and expressly stating that it "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *Id.* at 206 n.88. *See also WRTL I*, 546 U.S. 410 (as-applied challenges permitted despite argument based on "in the future" statement).[53] So the meaning of the "in the future comment" is confined to its context and simply means that prospectively the

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[52]Judge Leon used nearly identical "future" language in holding that the primary definition of electioneering communication was unconstitutionally overbroad and likely to be higher in a "particularly contentious, or active, legislative period." 251 F. Supp. 2d at 798-99. "[T[here is reason to believe that the amount of issue advocacy likely to be generated *in future election cycles* will be at least as substantial as it was during those years," he continued. *Id.* at 799 (emphasis added). The Supreme Court was simply answering Judge Leon's argument by saying that "in the future" percentages might actually drop in light of people's knowledge of the elements of the prohibition, making overbreadth less substantial.

[53]The "in the future" comment was part of the two-part facial overbreadth analysis for which *McConnell* cited 540 U.S. at 207, the leading case of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). *McConnell* summarized its holding under the two parts as follows: "Far from establishing that BCRA's application to pure issue ads is substantial, either in an absolute sense or *relative to its application to election-related advertising*, the record strongly supports the contrary conclusion." 540 U.S. at 207 (emphasis added). The discussion of "pure issue ads," *id.*, or "genuine issue ads," *id.* at 206 & n.88, was to establish that the prohibition was not overbroad in the context of "election-related advertising," *id.* at 207, which included both "electioneering ads" and "genuine issue ads," to use the terminology of defense expert Goldstein in his report in the *McConnell* litigation. Consequently, this Court was required by its analysis to talk about "genuine issue ads" in its facial overbreadth analysis. It was not gratuitously throwing in words about "genuine issue ads" that were irrelevant to its analysis and intended to be employed outside that context. Its "in the future" sentence had a distinct meaning in the facial overbreadth analysis context, but none beyond it.

overbreadth of the prohibition is not sufficiently substantial for facial invalidation. The comment may not be ripped from its context and forced to mean things entirely foreign to its plain contextual meaning. The comment does not shift the strict scrutiny burden from the government and force challengers to prove that the mentioned options are inadequate. It does not say that the other options are adequate for genuine issue ads. In fact, the Court clearly held that the PAC option was "constitutionally sufficient" only as to "*express advocacy*." 540 U.S. at 203 (emphasis added). Only to the extent that an ad can be proven by the government to be the "functional equivalent of express advocacy," *see id.* at 206, is the PAC option adequate. So *McConnell* only employed facial overbreadth analysis to sustain the prohibition and left for another day distinguishing "genuine" from "sham."[54]

There are also burden-shifting efforts to equate this case to cases where groups to which a *disclosure* provision would validly apply must demonstrate that they should be exempted

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[54]Another attempted burden-shifting argument is to the effect that once a facial challenge has been rejected no exception may be granted that goes to the core of what the prohibition sought to limit. FEC Br. at 18, 32, 38-39. The BCRA legislative history, the 2002 FEC electioneering communication rulemaking, and the *McConnell* litigation clearly reveal that (a) *sham* ads were the target of the prohibition and "genuine issue ads" were to be protected and (b) genuine issue ads can be distinguished from sham ads. *See infra* at Part IV and Bopp & Coleson, *Distinguishing* at 365. Since WRTL's ads are clearly "genuine issue ads" like the PBA Ad, this burden-shifting argument fails and, to the extent that these ads are at the "core" or "heartland" of the prohibition, then the facial upholding of the prohibition must be overruled. *See infra* at Part V. Another attempt to shift the burden is based on the notion that once a provision is upheld facially then all as-applied challenges shift the burden to the challenger (on the notion that because a communication here falls within the electioneering communication prohibition it must be considered presumptively a sham ad and the burden immediately shifts to WRTL to prove it is a genuine issue ad). *See* FEC Br. at 33-34. This flies in the face of this Court's unwavering requirement that burdens on First Amendment liberties must be justified by the government.

from disclosure because it would put their members at risk.[55] But such a balancing of harms is not appropriate to this case because the prohibition does not validly apply to "genuine issue ads," of which WRTL's are examples.[56] As to such genuine issue ads, the asserted interests are not compelling, and even if they were, the prohibition is not a narrowly-tailored, least-restrictive means of dealing with the asserted interest. *See* Part III. So this case is like *MCFL*, where (a) the FEC's asserted corporate-form interest was held not compelling as to *MCFL*-corporations, (b) the FEC's asserted interest in a bright-line test was held not compelling at all, and (c) the FEC's asserted interest in protecting donors was held neither compelling nor served by the prohibition when there were less restrictive means. *MCFL*, 479 U.S. at 259, 263, 260-61 (respectively).

I. *The Avoidance-Option Is Inadequate.* As just demonstrated, *McConnell*'s "in the future" comment (a) was only about the substantiality of asserted overbreadth, (b) could not have decided any future as-applied case, and (c) did not shift the burden to WRTL. *See supra* at Part II. And requiring WRTL to avoid using grassroots lobbying communications that meet the electioneering communication definition (the "avoidance-

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[55]Examples of such cases are *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982).

[56]Even under a balancing of harms test, however, "genuine issue ads" must be protected because in a republic the people's sovereign right to participate in self-government through the express liberties of expression, expressive association, and petition of their representatives clearly outweighs the interest of incumbent politicians in avoiding (at most) being criticized for their official actions near an election, in which they have chosen individually to run for reelection and collectively to remain in session (and highly active legislatively) in the periods preceding elections. And even if it were proper to shift the burden of proof, WRTL has established that its "genuine issue ads" pose no cognizable risk to the integrity of elections that would justify the prohibition and that a judicial test may be stated for future ads. *See infra* at Part IV.

option") or to justify why those options are not suitable would impose such a burden on WRTL's constitutional rights that it would itself trigger strict scrutiny because these alternatives are all less effective and constitutionally inadequate.

1. Not Broadcasting Is Inadequate. Using alternative means of communication, such as newspaper ads, is inadequate. Judge Kollar-Kotelly found in *McConnell* that broadcasting is the most effective means for the sort of communications at issue here. 251 F. Supp. 2d at 569-73. The obvious reason why Congress banned only broadcast ads is that they are the most effective, which is why WRTL chose broadcast ads. Barbara Lyons, the long-time executive director of WRTL, with many years of experience in promoting WRTL's issues, Record 76, Attachment 1 at 10 (2d Lyons Affid. ¶ 1), verified that broadcast advertising is the most effective means of grassroots lobbying for WRTL and that "non-broadcast communications would not provide WRTL with sufficient ability to reach the people of Wisconsin with WRTL's message," Record 30:10 (*AVC* ¶ 51), which WRTL's advertising consultant confirmed. Record 81-2:156 (Vanderground Dep. 14:21-17:8); Record 81-2:171 (Vandergound Dep. 76:12-77:5). And it is not the role of government to tell citizens how best to communicate: "The First Amendment protects [WRTL's] right not only to advocate [it's] cause but also to select what [it] believe[s] to be the most effective means for doing so." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

2. Non-Incorporation Burdens the Association Right. The most effective means of gathering, analyzing, and disseminating the necessary legislative information is through citizen watchdog groups created by the people. *See Buckley*, 424 U.S. at 22 (association permits amplified speech). The most effective form for these groups is the nonprofit corporation, not to amass business income, which nonprofits do not do, but to facilitate capable leadership by protecting directors and officers from individual liability for acts of the group. Conditioning one's

right to do grassroots lobbying on not incorporating imposes a significant obstacle to the group's speech, association and petition activities.

3. Other Times Are Inadequate. Requiring grassroots lobbying to be conducted before the blackout periods severely compromises the effectiveness of the lobbying. In this case, the blackout period was for 80 days and it is important to run the advertising up to the time of the vote. *See supra* at 12-17 (and the level of public interest is a prime consideration, too). Grassroots lobbying is customarily done when a bill or matter or an issue is directly before the Congress and it tends to be run in the period leading up to the scheduled votes. *Id.*

4. Not Naming a Candidate Is Inadequate. Grassroots lobbying is ineffective without telling constituents to whom their call should be made. Often, only one or two members of Congress in a state have a position on legislation that differs from others and so would be the object of grassroots lobbying. And many citizens do not know the names of their members of Congress, so would not know whom to call. A statute requiring that grassroots lobbying ads ask listeners to simply "Call your member of Congress," without naming the legislator needing calls, would render grass-lobbying ineffective. As the evidence in this case shows, naming a candidate is typical in grassroots lobbying and is needed. *See supra* at 18-19.[57] So it would not

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[57]Judge Leon singled out grassroots lobbying as being of special concern, providing a rationale from the record as to why it is necessary to *name* a legislator in such situations:

> The mere fact that these issue advertisements mention the name of a candidate (i.e., the elected representative in whose district the advertisement ran) does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes. To the contrary, the testimony of various plaintiffs' witnesses indicates that, in their experience, there are many reasons why it is helpful, if not necessary, to mention a candidate's name in these advertisements in order to focus the public's attention on a particular pending piece of legislation. For example, Paul Huard of NAM

have been as effective for WRTL to simply direct recipients to the Senate switchboard or to the BeFair.org website to find out who to lobby.

5. Not Targeting Is Inadequate. Grassroots lobbying must target the constituents in order to be effective because these constituents are the members of the public to whom the public official is responsible.

III. The Prohibition Fails Strict Scrutiny as Applied.

For restricting activity at the core of the American system of representative government, no blunt instruments are permitted. *MCFL*, 479 U.S. at 264-65. Appellants must establish that the prohibition as applied is the narrowly tailored, least restrictive means, to further a compelling governmental interest. *See, e.g.*, *White*, 536 U.S. at 774-75; *MCFL*, 470 U.S. at 262.

A. *Asserted Interest.* *McConnell* pointed to the already recognized "compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office," 540 U.S. at 205, to which sham issue ads were

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states "[t]here are many reasons that an issue ad may need to refer to the name of an elected official or candidate. Many bills are identified with particular sponsors and may be known by the sponsors' names. Also, both incumbents and candidates may be prominent people whose support or opposition to a bill or policy may have important persuasive effect. . . . Also, if an issue ad is used to explain why a legislative position of a particular Member of Congress is good for his or her district or state, the member generally must be mentioned. *The same is true if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position.*" Huard Decl. ¶ 12 (emphasis added); *see also* Finding 293. Similarly, [illegible]hell, Special Assistant for Public Affairs to the AFL[illegible]red, explaining that it is often necessary to refer to a federal candidate by name because "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question." Mitchell Decl. ¶ 11; *see also* Finding 293.

McConnell, 251 F. Supp. 2d at 794 (emphasis in original).

the "functional equivalent." *Id.* at 206. But since only *corporations* are prohibited (and unions for parity) from funding electioneering communications, the interest actually underlying the prohibition is the corporate-form interest, which *McConell* acknowledged: "The . . . question— whether the state interest is compelling—is easily answered by our prior decisions . . . , which represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (quotation marks and citations omitted). So the issue is whether (1) the corporate-form interest is compelling here and (2) the prohibition is the narrowly-tailored, least-restrictive way to protect the corporate-form interest (if compelling) as to a "genuine issue ad," such as the WRTL's ads.

B. ***Narrow Tailoring.*** As demonstrated in Part IV. WRTL's ads are not the "functional equivalent of express advocacy," *Id.* at 206, because they are "genuine issue ads,"*Id.* at 206 n.88, not shams. Rather, they are grassroots lobbying. The concern about such ads affecting elections, which is the corporate-form interest identified in *McConnell*, is not present, *see Austin*, 494 U.S. at 678 (Stevens, J., concurring) ("[T]here is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other"), and so does not apply. There is no corruption flowing from corporate efforts to lobby legislative or executive branch officials. *See Bellotti*, 435 U.S. at 776-78, 790-96, *Noerr*, 365 U.S. at 135, 137-38.

C. ***Less Restrictive Means.*** Strict scrutiny of the prohibition readily reveals two less restrictive means of dealing with the corporate-form concern and the overlaid functional-equivalence concern. The first eliminates the corporate-form concern by eliminating corporate money, which is discussed here. The second, which is the focus of Part IV, retains corporate money but eliminates the functional-equivalence concern by defining grassroots lobbying narrowly. These are sufficient to show that

the prohibition is not narrowly tailored as applied.

When it enacted BCRA, Congress had before it one less restrictive means of eliminating any concerns about corporate-form corruption, namely, "a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence . . . directly to this account for electioneering communications . . . ."[58] WRTL stated in its complaint that it would make all disbursements for electioneering communications from such an account if the court would not grant relief from the prohibition as to disbursements from its general account. Had Congress enacted this segregated bank account option in place of the prohibition, Congress would have entirely eliminated corporate-form corruption concerns because the corporation would not have been using any money from business activity or receipts from other corporations. Therefore, the prohibition is unconstitutional as applied.[59]

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[58]2 U.S.C. § 434(f)(2)(E). Congress said that an entity permitted to broadcast electioneering communications and required to report disbursements for them, would only have to report contributors of $1,000 or more to that *account* (as opposed to general fund donors) if it made its disbursements for electioneering communications from such a segregated bank account.

[59]Yet another means that would be less restrictive on the people's First Amendment liberties would be for Congress to recess during elections along the British model, e.g., Congress might recess for sixty days before general elections and thereby reduce the need for grassroots lobbying during these times. Two Appellants' amici curiae have suggested a shorter prohibition period. *See, e.g.*, Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 Minn. L. Rev. 1773, 1802 (2001) ("[n]arrow drafting may include shorter time periods (for example 30 days rather than 60 days"). It must be remembered that part of the perceived problem that is set out to justify the prohibition is based on matters out of the hands of the people, namely, (a) Congress remains in session in prohibition periods, (b) prohibition periods are particularly intense and important legislative times, *see* 251 F. Supp. 2d at 911 (Leon, J.) (prohibition periods "are often periods of intense legislative activity" and "[s]ome of the

D. *McConnell's Other Concerns Not Implicated.* Grassroots lobbying does not implicate *McConnell*'s other expressed concerns about "sham issue advocacy." 540 U.S. at 132. First, the Court noted that such ads "could be aired without disclosing the identity of, or any other information about, their sponsors." *Id.* In fact, the Court noted, "sponsors of such ads often used misleading names to conceal their identity." *Id.* at 128 (providing examples), 196-97 ("concealing their identities," "dubious and misleading names").

This case implicates none of these concerns. Because WRTL does not challenge the disclaimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of all electioneering communications, both as to disclaimers and public reports. The whole system will be transparent. With all this information, it will then be up to the people to decide how to respond to the call for grassroots lobbying on a particular governmental issue. And to the extent that there is a scintilla of perceived support or opposition to a candidate, a remote possibility necessitated by the people's sovereign right to participate in representative government, the people, with full disclosure as to the messenger, can make the ultimate judgment. "Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." *Bellotti*, 435 U.S. at 792 n.31. "The First Amendment rejects the 'highly 'paternalistic' approach . . . ." *Id.*

Furthermore, the desirability of a "bright-line rule" does not defeat this as-applied challenge. This Court has already held that where constitutional justification is absent, the "desire for a bright-line rule. . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL*, 479 U.S. at 263 (emphasis in origi-

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President's or Attorney General's boldest initiatives are advanced during election years—often within 60 days of an election"), and (c) incumbents become candidates because they choose to run for reelection.

nal).[60] However, a bright line favoring, rather than suppressing, expression, association, and petition is helpful to the people, and one can be developed, as shown next.

IV. Genuine Issue Ads Can Be Adequately Identified and Exempted from the Prohibition.

As the district court correctly held, the prohibition may not constitutionally be applied to WRTL's ads because they are neither "the functional equivalent of express advocacy," JS App. 26a (*citing McConnell*, 540 U.S. at 206), nor was there any "link" between the ads and Sen. Feingold's fitness for office. JS App. 27a. Such genuine issue ads can be adequately identified and exempted from the electioneering communication prohibition. *See also* Bopp & Coleson, *Distinguishing* at 386 (setting out suggested test with analysis).

A. *The Unfulfilled Promise.* A promise was made by BCRA's sponsors, when Congress debated the electioneering communication prohibition, that "genuine issue ads" and the subset of grassroots lobbying would not be prohibited. "Genuine issue ad" was a term of art used throughout BCRA's enactment and the *McConnell* litigation, including by this Court. 540 U.S. 206 n.88 ("[W]e assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads."). *See supra* at 7-8 (use as a term of art by *McConnell* experts and lower court).

Senator Jeffords (who introduced the Snowe-Jeffords amendment that became the prohibition) declared on the Senate floor that the prohibition

> will not affect the ability of any organization to urge *grassroots contacts* with lawmakers on upcoming votes. The Snowe-Jeffords provisions do not stop the ability of

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[60] In any event, the Court could adopt a bright-line test for grassroots lobbying that is every bit as bright as the exception for *MCFL*-type corporations created in *MCFL*. 479 U.S. at 263-64. The sort of "genuine issue ads" that constitute grassroots lobbying can be neatly cabined without placing any burden on the courts or the FEC.

> any organization to urge their lawmakers on upcoming issues or votes. That is one of the biggest distortions of the Snowe-Jeffords provisions. Any organization can, and should be able to, use their *grassroots communications* to urge citizens to contact their lawmakers. Under the Snowe-Jeffords provision, any organization still can undertake this most important task.

147 Cong. Rec. S2813 (emphasis added).

Co-sponsor Sen. Snowe said: "[L]et's look at the *genuine issue ad*, . . . which this provision would not apply to." 147 Cong. Rec. S2458 (emphasis added). Senator Paul Wellstone in offering an amendment to the Snowe-Jeffords Amendment that would eliminate an exemption from the prohibition for non-profit organizations (under I.R.C. §§ 501(c)(4) or 527) declared that genuine issue ads were not the target: "I am not talking about ads . . . that are legitimately trying to influence policy debates." 147 Cong. Rec. S2846. He emphasized his point by repetition, "I am not talking about legitimate policy ads. I am not talking about ads that run on any issue." *Id.*

From these statements by BCRA's prime sponsors of the electioneering communication prohibition, it is clear that the congressional intent was to exclude grassroots lobbying ads. But Congress left creation of the exemption to FEC rulemaking, giving it authority to make exemptions, provided that no exempted communication "promotes or supports . . . or attacks or opposes a candidate" (called "PASO"). 2 U.S.C. § 434(f)(3)(B)(iv). So when the FEC did its 2002 electioneering communications rulemaking it solicited comments on four proposed alternatives for a grassroots lobbying exemption. 67 Fed. Reg. 51131. *See* Bopp & Coleson, *Distinguishing* at 407 ("FEC Proposed Rules for Comment" included in Appendix collecting rule proposals).

The BCRA prime sponsors proposed specific wording for a grassroots lobbying exemption and told the FEC that it had authority to enact their rule under BCRA. *Id.* at 407-08 (Prime

Sponsors Rule in Appendix).[61] This lends weight to the legislative history indicating that a grassroots lobbying exemption was intended, and it reveals that the prime sponsors believed that a rule could be fashioned that would meet the statutory PASO requirement.

But the FEC decided that the prime sponsors' statement that their rule complied with congressional intent as to the PASO standard was wrong, "conclud[ing] that communications exempted under any of the alternatives for this proposal could well be understood to promote, support, attack, or oppose a Federal candidate." Electioneering Communications, 67 Fed. Reg. 65190, 65201 (Oct. 23, 2002). What governed under this FEC statement was hearer perception, and the FEC's apparent belief that any reference to an issue and a candidate could be viewed as influencing an election. As a reult, the FEC's understanding of PASO clearly encompassed communications having only the remotest speculative possibility of some minimal electoral effect.[62] The FEC's extremely broad PASO interpretation was a precursor to the FEC's position here that

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[61] *See also Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords* at 10 (attached to Letter from Sen. John McCain, Sen. Russell D. Feingold, et al. to Mai T. Dinh of the FEC (Aug. 23, 2002)), available at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf.

[62] One effect of the FEC's refusal to make a rule was that it retained the sole authority to make any exceptions through the advisory opinion mechanism. The FEC made an exception to the prohibition when it said, in FEC Advisory Opinion 2004-31, that candidate Russ Darrow, Jr.'s name could be used in what were otherwise electioneering communications by the automobile dealerships that he founded and that bore his name, but were now under the day-to-day control of his son, Russ Darrow III. Of course, the self-government rights at issue herein go far beyond such commercial speech. Another effect is that grassroots lobbying during prohibition periods, especially the highly active legislative period before general elections, seems to have largely disappeared, likely due to the burdens of the PAC option.

now (1) sees a genuine issue ad as an empty vessel into which it can pour PASO intent based on an investigation into external matters that are neither statutorily nor constitutionally cognizable and (2) believes it can regulate anything having some speculative, remote electoral effect. *See supra* at 19.

In 2006, the FEC twice rejected requests to make a rule protecting genuine grassroots lobbying, *see* Bopp & Coleson, *Distinguishing* at 360-61, even after this Court in January of that year expressly pointed to the FEC's authority to promulgate a grassroots lobbying exception. *WRTL I*, 546 U.S. 410, 126 S. Ct. at 1017. At the *WRTL I* oral argument, Justice Breyer noted that "[Congress] told the FEC to go and produce a set of regs that would, in fact, try to screen out that legitimate 7 percent [of genuine issue ads]," and then asked the Solicitor General, "why haven't they done it?" Transcript of Oral Arg. at 43-44, *WRTL I*, 546 U.S. 410 (No. 04-1581).

B. *The Concession.* Senator McCain and other BRCA Prime Sponsors submitted a rule in the 2002 FEC rulemaking, which was joined by counsel and groups briefing this case and which focused on the text of the ad itself (along with the relevant context, *see supra* at n.30, not on an external intent-and-effect context.[63] The Center for Responsive Politics

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[63]**Prime Sponsors Rule:** In the 2002 FEC rulemaking on electioneering communications, the BCRA prime sponsors (**Sen. McCain**, Sen. Feingold, **Rep. Shays**, **Rep. Meehan**, et al.—bolded names representing intervenors in the present case) proposed the following rule for an exemption as being within the FEC's authority and properly distinguishing genuine from sham grassroots lobbying:

> The term "electioneering communication" does not include any communication that:
>
> ****
>
> (x)(A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter; (ii) the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or

proposed a similar rule, only it allowed communicators to actually name the person who was the target of the grassroots lobbying. *See* Bopp & Coleson, *Distinguishing* at 408 (text of CRP Ad). In light of these prior proposals conceding (a) that genuine issue ads can be distinguished from sham ads and (b) that the distinction can be made on the basis of a four-corners rule (with relevant context) and without any intent-and-effect investigation, it is surprising to see the Intervenors, their counsel, and amici now trying to switch sides. A distinction is clearly possible, and it can be done on a four-corners rule. *See also* Bopp & Coleson, *Distinguishing* at 381-84 ("Necessity of Focusing on the Text").

C. *Cognizable Effect.* In formulating a test for genuine issue ads, the mere possibility of some incidental, de minimis effect on an election would not be constitutionally cognizable as a governmental interest. The FEC has already conceded this before the Supreme Court in *WRTL I* when Justice Scalia asked: "You think Congress has the power to prohibit any First

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executive branch matter; and (iii) the communication refers to the candidate only by use of the term "Your Congressman," "Your Senator," "Your Member of Congress" or a similar reference and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the communication contains no reference to any political party.

(B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate's record or position on any issue; (ii) the candidate's character, qualifications or fitness for office; or (iii) the candidate's election or candidacy.

Detailed Comments of BCRA Sponsors Senator John McCain [et al.] at 10.

The following participants in present briefing joined in proposing this rule: The Campaign and Media Legal Center (**Campaign Legal Center**), *see* Letter from Glen Shor to Mai T. Dinh at 10-11 (Aug. 21, 2002) (**Trevor Potter** named therein as General Counsel); **Common Cause** and **Democracy 21**, Letter from **Donald J. Simon** to Mai T. Dinh at 12 (Aug. 22, 2002) (adding that "this proposed exception properly balances the competing concerns" and avoids "sham communications"). Comments available at http://www.fec.gov (archive re electioneering communication rulemaking).

Amendment . . . conduct that might have an impact on the election? I mean, is that the criterion for whether it . . . can be prohibited?" Transcript of Oral Arg. at 31, *WRTL I*, 126 S. Ct. 1017 (No. 04-1581). The Solicitor General responded: "No, Justice Scalia, it's not." *Id.* And after extensive discovery and employing two experts, the FEC could only come up with the possibility that WRTL's ads might have some unquantifiable "electoral effect."[64] The district court reviewed the FEC's best efforts to prove this electoral effect at summary judgment and then rejected the "highly questionable assumption[] that . . . the speculative conjecture of experts can *actually* project the 'likely impact' of a given ad on the electoral process," for which assumption it did not find "sufficient evidence." JS App. at 20a (emphasis in original). So the government could not meet its strict scrutiny burden to prove that it has a cognizable interest in regulating WRTL's ads.

D. *The Prototype.* Since the PBA Ad[65] was identified by the

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[64] *See, e.g.*, Record 81:17 (FEC Mem. Supp. Mot. SJ at 9) (FEC argued that the ads "would likely have had a significant electoral effect."). But what Bailey said at deposition was that WRTL's "Waiting" ad "*could* have, *could* have, it *might have no impact*, but *could* have substantial impact on the election itself." JA 148(emphasis added). Moreover, when called upon to compare the Waiting Ad, JS App. at 5a n.5 to the PBA Ad, *infra* at n.65, Bailey thought that WRTL's ad was more subtle and so might be more effective in influencing elections, JA 147-48, which, by logical extension, yields the remarkable proposition that the *less* an ad is the functional equivalent of express advocacy the stronger the government interest is in regulating it.

[65] **PBA Ad:** This was called the "Feingold Kohl Abortion 60 Ad," but as its topic is partial-birth abortion ("PBA"), that name is more memorable:

> America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and exposed [sic] of their newborn baby in a dumpster. Most Americans couldn't believe that this defenseless human life could be so coldly snuffed out. But incredibly, if a doctor had been present that day in Delaware and delivered the infant, all but one inch from full birth and then killed him it would have been perfectly legal. Instead of murder or

FEC experts in *McConnell* as a "genuine issue ad," and since it was a grassroots lobbying ad run by a pro-life group that also mentioned Senators Kohl and Feingold, it provides the logical prototype for determining the factors that identify genuine issue ads. *See* Bopp & Coleson, *Distinguishing* at 385-86 (more fully discussing following proposal). It serves as both a good pattern for creating a test and a benchmark for determining if other elements are required.

In particular, the PBA Ad has three essential features that establish that it is a grassroots lobbying ad that may not constitutionally be prohibited under § 441b as an electioneering communication. *First*, based on the content of the communication, it focuses on a current[66] legislative branch matter, takes a position on the matter, and urges the public to ask a legislator to take a particular position or action with respect to the matter in his or her official capacity. *Second*, the ad does not mention any election, candidacy, political party, or challenger, or the official's character, qualifications, or fitness for office. *Third*,

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> manslaughter, it would have been called a partial-birth abortion. Killing late in the third trimester, killing just inches away from full birth. Partial-birth abortion puts a violent death on thousands of babies every year. Your Senators, Russ Feingold and Herb Kohl voted to continue this grizzly [sic] procedure. Contact Senators Feingold and Kohl today and insist they change their vote and oppose partial birth abortion. Their number in Washington is 202-224-3121.

McConnell v. FEC, 251 F. Supp. 2d 176, 312 (D.D.C. 2003) (Henderson, J.) ("[sic]" included in Henderson opinion).

[66] *Current* requires that the ad not talk about a past issue, but one under current consideration, which *McConnell* district court judges found to be a useful way to distinguish genuine from sham issue ads. *See, e.g.*, *McConnell*, 251 F. Supp. 2d at 577 (Kollar-Kotelly, J.) (rejecting ad as genuine for "failing to note whether there was any upcoming legislation related to the past votes that the advertisement might have been targeting"), 918 (Leon, J.) (examples of "candidate-centered ads" cited past votes of legislators). This requirement eliminates the "Jane Doe" ad cited in *McConnell* as being a sham. 540 U.S. at 126-27.

as long as the ad follows this pattern, the fact that the ad states the position of the candidate on the matter, which is objectively accurate and based on publicly available means of verification, and praises or criticizes the candidate for that position, does not effect its genuineness.

Analytically, the first part makes the ad a grassroots lobbying ad and, by its "focus," eliminates cognizable electoral effect. The second part further assures a lack of such cognizable effect, by not mentioning anything about the election or "the official's character, qualifications, or fitness for office." And the third part allows a forceful discussion of the merits of the matter, which merely say that the public official is wrong or right on the issue, not wrong for office.[67]

E. *WRTL's Ads Meet the PBA Ad Test.* WRTL's ads are materially indistinguishable from the PBA ad. *First*, WRTL's ads focus on a current legislative branch matter, take a position on the matter, and urge the public to ask their two Senators to take a particular action with respect to that matter in their official capacity. *Second*, the ads do not mention any election, candidacy, political party, or challenger, or the Senators' character, qualifications, or fitness for office. *Third*, while

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[67]For example, in *Christian Civic League of Maine, Inc. v. FEC*, 433 F. Supp. 2d 81 (D.D.C. 2006), the Crossroads Ad at issue said, "Unfortunately, your senators voted against the Marriage Protection Amendment two years ago." *See* Bopp & Coleson, *Distinguishing* at 404 (text of Crossroads Ad in Appendix), The district court, however, erroneously adopted the FEC's argument in stating that "the League's advertisement – which characterizes Senator Snowe's past stance on the Marriage Protection Amendment as "[u]nfortunate[]" – is the sort of veiled attack that the Supreme Court has warned may improperly influence an election" and so pronounced it a "sham." *CCLM*, 433 F. Supp. 2d at 89 (opinion denying motion for preliminary injunction). Even though Sen. Snowe was running unopposed in a primary election, the district court insisted that "the advertisement might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection." *Id.*

permissible, the ads do not state the position of the candidate on the matter, nor do the ads praise or criticize the candidate for that position.[68]

The sole focus of the ads was imminently pending, specific legislative activity while Congress was in session, the timing of which was beyond the control of WRTL. The ads asked for calls to *incumbent* Senators who clearly had power to immediately affect the filibuster activity. These are unlike the "sham issue ads" that ask hearers to call candidates, even non-incumbents, about something vague, abstract, unfocused, and/or possibly in the past. The only reference to Sen. Feingold was in the closing call to his constituents to contact him and ask him to oppose the filibusters. As Judge Leon noted, even a *McConnell* defense expert concluded that an ad mentioning a

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[68]Material at the website www.BeFair.Org cannot be incorporated by reference into the WRTL ads because the FEC has never combined different communications to create express advocacy and cannot now do so with electioneering communications (although WRTL's ads would remain genuine issue ads even if the importation were permissible). Each communication stands on its own as to content, which means that other WRTL communications (on the website or elsewhere) cannot be combined with the ads to manufacture absent content in the ads. *MCFL* provides the example. If one of MCFL's newsletters had said "vote prolife" and another said "candidate X is prolife" (as in a voter guide), no express advocacy would have occurred, but if both things were said in the same communication then it would contain express advocacy. *See MCFL*, 479 U.S. at 249. In the last election, AARP ran its "Don't Vote" campaign, which consisted of broadcast ads telling people not to vote until they had visited AARP's website to see the position of the candidates on the issues. If the naming of candidates at AARP's website were incorporated by reference, then AARP's broadcast ads were electioneering communications. Until the FEC brings an enforcement action against AARP, the argument that what is said at BeFair.org is incorporated by reference in WRTL's ads cannot be taken seriously. In any event, the website contained no express advocacy, but did contain numerous ways to contact the Senators (including emailing from within the website), helpful information on federal courts, the judicial nomination process, filibusters, and judicial emergencies. *See* http://web.archive.org/web/20040729081130/http://www.befair.org/.

candidate's name is a genuine issue ad, if "the body of the ad has no referent to [a candidate] whatsoever [and] the only referent to [the candidate] is the call line." 251 F. Supp. at 795.

WRTL's ads asked constituents to call *both* Sen. Kohl and Sen. Feingold, lessening the focus on Sen. Feingold even more and indicating that the issue was filibustering, not Sen. Feingold. The ads dealt with non-candidate Kohl and candidate Feingold equally, not singling Sen. Feingold out in any way. The ads dealt with a long-time, natural concern for WRTL, which would like President Bush's judicial nominees to be appointed, so there is no question of a made-up issue.

Defense expert witness Bailey, agreed that the ads were grassroots lobbying ads, JA 151, referenced a specific current legislative matter, JA 154, did not identify the Senators as a candidates, JA 155, and contained no reference to Sen. Feingold's character, qualifications or fitness for office. JA 155. At most, Bailey thought the ads only "implied" the Senators' position on the issue, since the ads were consistent with the proposition that one or both were undecided, JA 148,[69] and contained no words that promoted, supported, attacked or opposed them. JA 156.

F. The FEC's Erroneous Subjective Intent Test. The Appellants contend that the alleged subjective intent of WRTL and the ads alleged electoral effect should be considered, not just the content of the ads. In so doing, Appellants contend that the court should look to external factors such as the activities of WRTL's PAC,[70] statements in WRTL's press releases and

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[69]The fact that WRTL's Ads asked people to call Senators Kohl and Feingold about the filibustering implies nothing about the Senators' positions on the issue. Grassroots lobbying is used to firm up legislators' positions as well as to attempt to change them. So there can be no implication of criticism of either Senator because judicial filibustering was criticized in the ads.

[70]As to PAC activity, the very statutory *prohibition* at issue in this case, expressly *excludes* any consideration of PAC activity, activity of a separate legal entity, *Cal. Med. Assoc'n*, 453 U.S. at 196, in determining whether a

newletters,[71] and the campaign statements of opposing candidates, political parties and other public officials.

This Court has consistently rejected this ar gument. In *Buckley*, express advocacy was to be found based on the communication itself. *Buckley*, 423 U.S. at 43 (express advocacy "limited to communications that include explicit words of advocacy . . . ."). In so doing, Court rejected a test that depended on the hearers' subjective judgment:

> (W)hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. . . . Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. (internal quotation marks and citation omitted). This Court applied this analysis in *MCFL* by only looking to the text of MCFL's newsletter to find that it contained express advocacy. 479 U.S. at 249.[72]

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corporation has made an independent expenditure or an electioneering communication. 2 U.S.C. § 441b(b)(2)(C) ("*shall not include* . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes" (emphasis added)).

[71]This is an unconstitutional condition, i.e., if you want this benefit you must give up that right, *see, e.g., Healy v. James*, 408 U.S. 169, 180-84 (1972); *Speiser v. Randall*, 357 U.S. 513, 518 (1958), in this case requiring a tradeoff of constitutional rights instead of benefits.

[72]MCFL had a PAC, 479 U.S. at 255 n.8, but this Court never asked what the PAC had said or done in its analysis of whether MCFL's communication contained express advocacy. *MCFL*, 479 U.S. at 249. MCFL had engaged in various legislation-oriented activities, including grassroots lobbying. *Id.* at 242. But this Court never considered any such activity in determining whether there was an independent expenditure. Instead the

As to the "electioneering communication" provision, the law again requires examination of the communication itself and the relevant context (i.e., the factual elements making up the definition). "Electioneering communication" is defined as a "communication" meeting certain criteria. 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29. Nowhere in the definition is there any instruction to see whether the organization's PAC or press releases said. And this Court in *McConnell* upheld the provision based only on an examination of the texts of ads broadcast during the black out period. 540 U.S. at 203-07.

Moreover, the *Noerr-Pennington* line of cases agrees that, where the right to petition is involved, intent and effect cannot be considered. Even in the context of federal antitrust and labor relations law,[73] where no additional First Amendment rights attach, the government cannot prohibit activities, that would otherwise violate antitrust or labor law, when those actions are "'an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.'" *BE & K*, 536 U.S. at 525 (*quoting Noerr*, 365 U.S. at 136). These grass roots lobbying activities were protected "*regardless of intent or purpose.*" *Id.* (*quoting Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965)) (emphasis added). Thus, in this grassroots lobbying case, the alleged intent or purpose of WRTL is also irrelevant.

Court noted that the "Special Edition" of MCFL's *newsletter* said to vote prolife and then identified which candidates were prolife. *Id.* at 249. The sole focus was on the particular *communication* in the newsletter and what its words said, not MCFL's other communications.

[73]The protection for grassroots lobbying recognized in the *Noerr-Pennington* line of cases has been extended to "situations where groups use . . . courts to advocate their causes and points of view," *Cal. Motor Transport*, 404 U.S. at 511, to the context of labor relations law, *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737, 743 (1983), and where groups used the court to advocate in the context of labor relations law. *BE & K*, 536 U.S. 516.

V. *McConnell*'s Facial Upholding Should Be Overturned.

In *McConnell*, this Court rejected a facial challenge to the electioneering communication prohibition on the grounds that, even though "the interests that justify the regulation of campaign speech might not apply to the regulation of issue ads," the statute's application to genuine issue ads did not render it facially overbroad. 540 U.S. at 206-07 & n.88. The arguments raised by Appellants reveal that the *McConnell*'s facial upholding is incorrect for two separate and independent reasons. First, because Appellants' urge that the electioneering communication prohibition directly targets genuine issue ads, such as WRTL's, it is now clear that the statute's application to genuine issue ads is substantial. *See id.* at 207-08. Second, even if the statute's overbreadth is still not substantial, the as-applied remedy has proven to be inadequate to protect the exercise of core First Amendment rights. This Court should therefore either render the as-applied remedy meaningful by creating a test fully protective of citizens' right to engage in genuine issue ads, or overturn *McConnell*'s facial upholding.

A. *Appellants Put McConnell at Issue.* Appellants themselves call into question *McConnell*'s facial upholding of the prohibition by insisting that WRTL's ads—which by any reasonable test are "genuine issue ads" like the gold-standard PBA Ad—are actually in the "*heartland*," FEC Br. at 18, 28, 36 n.9 (emphasis added), or "*core*," Intervenor's Br. at 16, 21, 31 (emphasis added), of what Congress intended to ban with the electioneering communication prohibition. If that claim by BCRA sponsors and the FEC is to be taken seriously, then the prohibition is facially unconstitutional. It is unconstitutional for specifically targeting constitutionally protected "genuine issue ads" with no strict-scrutiny justification and for seeking to silence criticism of the government by the people. "[A]n ordinance suspending unconditionally the right of assembly and free speech" cannot stand. *See Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971).

McConnell decided that the electioneering communication prohibition was not facially unconstitutional, i.e., it was not substantially overbroad. 540 U.S. at 207 (*citing Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973), and *Virginia* v. *Hicks,* 539 U.S. 113 (2003)). The substantial overbreadth doctrine is to prevent chilling of protected speech, especially where, as here, there are criminal sanctions. *See, e.g., Hicks*, 539 U.S. at 119 (and collected cases). The doctrine was developed to assure that constitutionally protected speech would not go unprotected. *See id.* ("reduces . . . social costs caused by the withholding of protected speech"); *Broadrick*, 413 U.S. at 612 ("[I]t has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech by others may be muted . . . ."). The Court's facial upholding of the prohibition was premised on the belief that the prohibition's application to protected "genuine issue ads" would be rare. *See* 540 U.S. at 206-07.

As now revealed by Appellants' arguments, all of the assertions made by the FEC, the prime sponsors and the campaign finance reform lobby about how the prohibition is not overbroad for capturing too many "genuine issue ads" were themselves shams[74] because, under their present argument, there really are no "genuine issue ads" that mention candidates. In attacking as "sham" WRTL's ads, which are in all material ways like the Goldstein-endorsed PBA Ad, Appellants reveal that all along they intended to restrict "genuine issue ads." That, of course, is apparent from the litigation in this case and in *CCLM* (No. 06-589), in which the FEC and Intervenors have made no effort to assist the courts and the people by identifying

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[74]Although in *McConnell* Appellants argued percentages of genuine issue ads that were affected versus sham issue ads, the FEC now only mentions the word "sham" twice in its brief, neither time attempting to distinguish "genuine issue ads" from "sham" ads, FEC Br. at 17, 48 n.14, and the Intervenors' Brief never mentions the word "sham."

the characteristics of "genuine issue ads." Instead they have made every effort to prove that their own experts in *McConnell*, and this Court in *McConnell*, 540 U.S. at 206 n.88 (recognizing "genuine issue ads"), were wrong and "genuine issue ads" do not even exist.

Appellants attempt to justify the prohibition based on expert opinion that WRTL's ads might have some electoral effect. *See infra* at 19. But these experts thought that any communication during a prohibition period could influence an election, even if it didn't mention a candidate. *See infra* at 19-21. If that justification stands, then the prohibition is woefully underinclusive and, if not overturned on that basis, Congress could use this justification to expand the definition of electioneering communication to prohibit vast quantities of speech and activity. Appellants essentially make a circular argument, namely, that communications near elections affect elections so they may be regulated, and then, when confronted with the necessity of dealing with as-applied challenges for communications near elections, they fall back on the argument that, since these communications are near elections, they will affect elections and so there can be no exceptions.

In light of Appellants' new arguments, the *McConnell* Court's conclusion that application of the prohibition to genuine issue ads would not be "substantial, either in an absolute sense or relative to its application to election-related advertising," 540 U.S. at 207, is now unsupportable. "[W]here [a] statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Thus, concern for the chilling effect created by overbreadth should be greatest where—as Appellants have now admitted is the present case—the challenged statute is "aimed directly at activity protected by the Constitution." *See Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971). When a statute "'does not aim

specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of the freedom of speech,'" facial invalidation is appropriate. *New York v. Ferber*, 458 U.S. 747, 771 & n.26 (1982) (*quoting Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)).

B. *The As-Applied Remedy Is Inadequate.* The overbreadth doctrine assumes that, when a statute is upheld on its face, there is an effective remedy for protected speech in the form of as-applied challenges. This Court assumes that "whatever overbreadth may exist should be *cured* through case-by -case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-16 (emphasis added). Thus, the as applied remedy must be "*adequate* to assure that any overbreadth under the Law will be curable through case-by-case analysis of specific facts." *New York Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 15 (1988) (emphasis added).

But if an as-applied challenge is not "adequate," then "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Hicks*, 539 U.S. at 119 (citation omitted). The problems identified—considerable burden, risk of penalty, and risk of silence—all exist here to a degree that the as applied remedy does not cure the overbreadth.

The present case and *CCLM* (No. 06-589 in this Court) reveal this. In both *WRTL* and *CCLM*, preliminary injunctions were denied on the basis that neither group suffered any cognizable harm because there was always the PAC-option (although WRTL had insufficient PAC funds and CCLM had no PAC) or the corporation could simply avoid the "electioneering communication" definition altogether. JS App. 63(a)-

64(a), *Christian Civic League of Maine v. FEC*, 433 F. Supp.2d 81, 86 (D.D.C. 2006). The FEC fought expedition of CCLM's appeal. *CCLM* (No. 05-1447 in this Court) *FEC Opp. to Appellant's Mot. to Expedite and Consolidate Briefing*. Absent a preliminary injunction, the opportunity for expression and petition was forever lost. CCLM's case was then held moot by its district court. *Christian Civic League of Maine v. FEC*, No. 06-00614, 2006 WL 2792683 at *7 (D.D.C. Sept. 27, 2006). WRTL finally obtained recognition from its district court that its ads were constitutionally protected, but not in time to actually broadcast them. JS App. 29a. But the district court declined to state a general test to protect future ads, JS App. 22a-25a, so that this process must be gone through for each set of ads.

So any citizen group having the temerity to want to run future ads must (1) plan well in advance to allow ample litigation time (problematic because the need for grassroots lobbying frequently arises on short notice), (2) retain a lawyer, (3) endure the invasion of its privacy by a discovery investigation at the hands of the FEC and Intervenors (which often will include their political opponents), and (4) pay the legal expenses and costs to endure the scorched-earth litigation practices of the federally-funded FEC and the statutorily-permitted Intervenors in order to get prior permission from a court to run a constitutionally-protected communication at the core of our system of self-governance by the people.[75] After all that, they may still run into the dead-end of having their case mooted for lack of injunctive relief, as happened to CCLM. Groups like

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[75]Or, as the FEC suggests, FEC Br. at 24 n.6, a citizen group could just break the law and risk *criminal* penalties while still having to retain a lawyer, endure an investigation that ties up its people and resources for extended periods during the most crucial of times, reveal its otherwise private documents and inner workings, and pay vast sums to fight the FEC and well-funded Intervenors. *Contra Dombroski v. Pfister*, 380 U.S. 479, 486 (1965) ("The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded . . . .")

WRTL and CCLM have to work very hard to raise money for their ideological advocacy, and they do not have substantial funds for litigation. Because such cases would be against the FEC, citizen groups have no hope of recovering attorneys' fees and costs if they are a prevailing party. They must pay all of the costs of obtaining court permission to run a "genuine issue ad."

Thus, the proven pattern of opposition on the part of Appellants to as-applied challenges reveals that they will not be simple, quick, inexpensive little court visits whenever the need for grassroots lobbying suddenly arises and citizens need to act. Absent an adequate remedy to protect "genuine issue ads," the prohibition becomes like a burdensome prior restraint on core political speech.[76]

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[76]Prior restraint of speech, which is among "the most serious and the least tolerable infringements on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), "suppresses the precise freedom which the First Amendment sought to protect against abridgement," *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968), which "bear[s] a heavy presumption against its validity." *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980). Prior restraints are particularly lethal when they deprives core political speech of its practical value. *See Carroll* 393 U.S. at 180 ("It is vital to the operation of democratic government that the citizens have facts and idea on important issues before them. A delay or even a day or two may be of crucial importance in some instances."); *see also Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) ("[T]iming is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all. To require Shuttlesworth to submit his parade permit application months in advance would place a severe burden upon the exercise of his constitutionally protected rights."). Because the First Amendment's protection of political speech "has a structural role to play in securing and fostering our republican system of self-government," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring), a prior restraint's suppression of political speech, even if only temporary until the putative speaker prevails in litigation, is "seriously prejudicial to that system of government which the First Amendment, above all else, should be thought to undergird." John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 Yale L. J. 409, 433 (1983).

C. *Absent Clear Protection for Grassroots Lobbying, McConnell's Facial Upholding Should Be Overturned.* How may this problem be remedied? One option is to create a safe-harbor for grassroots lobbying, as proposed herein, that will eliminate the need for most future as-applied challenges. The other option is to overturn the facial upholding of the prohibition in light of the real-world experience in *WRTL* and *CCLM*, which have demonstrated that the as applied remedy for protecting genuine issue ads is inadequate. In light of the experience of these cases, WRTL believes that the better course is to overrule the prohibition, and it specifically requests a reversal. "Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). This case is well within this Court's standards for reversal.

This Court has provided standards for determining when it is appropriate to overrule precedent. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996). Stare decisis is a "principle of policy," not an "inexorable command." *Id.*; *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). The Court will overturn erroneous precedent. *Smith v. Allwright*, 321 U.S. 649, 665 (1944). Two primary rationales govern. First, "badly reasoned" or "unworkable" precedent will be overturned. *Seminole Tribe of Florida*, 517 U.S. at 63. *Accord Payne*, 501 U.S. at 827. Second, precedent is reversed if an essential factual assumption of the prior case was inaccurate or becomes inaccurate. *Vasquez*, 474 U.S. at 266. This Court applied these principles in *Lawrence v. Texas*. 539 U.S. 558 (2003). Justice Kennedy for the Court observed that stare decisis deserves respect but is not "an inexorable command." *Id.* at 577. He noted that the prior decision relied on an essential factual error. *Id.* at 571. Then he observed that it relied on

flawed legal reasoning. *Id.* at 577. Therefore, the Court held that it would not "remain binding precedent." *Id.* at 578.[77]

Consistent with the above guideline, the experience in this case and *CCLM* (No. 06-589) reveals that the assumption in *McConnell* that as-applied challenges would be an adequate remedy to protect genuine issue ads has proven inaccurate and unworkable. And while a few state legislatures have adopted electioneering communication prohibitions, they have viewed *McConnell* as a blank check to impose regulations that go well beyond those imposed by Federal law.[78] Therefore, there is clear justification for partially overturning *McConnell*.

CONCLUSION

For the reasons stated, this Court should (a) overturn the facial upholding of the prohibition in *McConnell* or (b) find the electioneering communication prohibition unconstitutional as

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[77]In the recent election-law case of *Randall v. Sorrell*, 126 S. Ct. 2479 (2006), the Court addressed the issue of stare decisis in relation to *Buckley v. Valeo*, 424 U.S. 1 (1976). Chief Justice Roberts and Justice Stevens concluded that *Buckley* should not be overturned because there was no subsequent change in the law, *id.* at 2489, there was no change in factual assumptions, *id.*, and state legislatures had relied on *Buckley*. *Id.* at 2490. Four concurring justices left open the possibility of overturning *Buckley*. *Id.* at 2501(Alito, J.) ("unnecessary to reach the issue"), 2501 (Kennedy, J.) (regulation "may cause more problems than it solves."), 2502 (Thomas and Scalia, JJ.) ("no bar to overturing *Buckley*").

[78]A number of states have adopted "electioneering communications," some of which reach *all* communications (not just broadcast), impose increased compliance burdens, and expand the time periods. *See* Alaska Stat. § 15.13.400(5); Ariz. Civ. Stat. Ann. § 16-901.01; Cal. Gov. Code § 85310; Colo. Const. Art. XXVIII, § 2(7); Conn. Gen. Stat. § 9-333c; Fl. Stat. § 106.011(18); Hi. Code R. § 11-207.6; Idaho Code Ann. § 67-6602(f); 10 Ill. Comp. Stat. 5/9-1.14; N.C, Gen. Stat. § 163-278.80(2); Okla. Stat. tit. 74, § 257:1-1-2; S.C. Code Ann. § 8-13-1300(31)(c); Vt. Stat. Ann., Titl 17 § 2891; Wash. Rev. Code § 42.17.020(20); W. Va. Code § 3-8-1A(10); *see also* Guam Code Ann. tit.3, § 19112.1.

applied to the three broadcast advertisements here, based on a clear and workable test which protects genuine issue ads generally. Alternatively, the prohibition should be declared unconstitutional as applied if made with disbursements from a segregated bank account as described in 2 U.S.C. § 434(f)(2)(E) (donations only from individuals).

Respectfully submitted,

James Bopp, Jr.,
Counsel of Record
Richard E. Coleson
Jeffrey P. Gallant
Raeanna S. Moore
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
812/232-2434
812/235-3685 (facsimile)

M. Miller Baker
Michael S. Nadel
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, DC 20005
202/756-8000
202/756-8087 (facsimile)

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In The

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Appellant,*

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*

SENATOR JOHN MCCAIN, *et al.*, *Appellants*

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*

On Appeal from the United States District Court
for the District of Columbia

Appellee's Response to Appellants' Jurisdictional Statements

M. Miller Baker
Michael S. Nadel
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, DC 20005-3096
202/756-8000
202/756-8087 (facsimile)

January 15, 2007

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
BOPP, COLESON & BOSTROM
THE JAMES MADISON CENTER FOR FREE SPEECH
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434
812/235-3685 (facsimile)

Corporate Disclosure Statement

Wisconsin Right to Life, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Statement

This appeal concerns an as-applied exception for three grassroots lobbying ads that the lower court held was constitutionally required for the "electioneering communication" prohibition contained in the Bipartisan Campaign Reform Act ("BCRA") of 2002. 2 U.S.C. §§ 434(f)(3) and 441b(a), (b)(2).

When the "electioneering communication" prohibition was proposed as an amendment to the BCRA, its sponsors explained that it would not prohibit grassroots lobbying. Senator Jeffords declared that his proposed prohibition:

> will not affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes. The last point bears repeating. The Snowe-Jeffords provisions do not stop the ability of any organization to urge their lawmakers on upcoming issues or votes. That is one of the biggest distortions of the Snowe-Jeffords provisions. Any organization can, and should be able to, use their grassroots communications to urge citizens to contact their lawmakers. Under the Snowe-Jeffords provision, any organization still can undertake this most important task.

147 Cong. Rec. S2813 (March 23, 2001). Sen. Paul Wellstone offered an amendment, that would eliminate a statutory exemption in Snowe-Jeffords for nonprofit organizations (under I.R.C. §§ 501(c)(4) or 527), but agreed that grassroots lobbying was not to be banned:

> I am not talking about ads . . . that are legitimately trying to influence policy debates – rather, this amendment only targets those ads that we all know are trying to skew elections but until now have been able to skirt the law. I am not talking about legitimate policy ads. I am not talking about ads that run on any issue.

147 Cong. Rec. S2846 (March 26, 2001). Thus, it was the intent of Congress to exclude genuine grassroots lobbying from the "electioneering communication" prohibition and it left it to the Federal Election Commission ("FEC") to do so explicitly. 2 U.S.C. § 434(f)(3)(B)(iv).

Furthermore, it is the text of the broadcast ads themselves that determines whether the "electioneering communication" prohibition, or any exception, applies. An "electioneering communication" is defined solely based on its text: " the term 'electioneering communication' means any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office," § 434(f)(3)(A)(i)(I), when made in defined proximity to an election, § 434(f)(3)(A)(i)(II), and targeted to the relevant electorate. § 434(f)(3)(C). The statutory exemptions are based solely on the content of the communication: "a news story, commentary, or editorial distributed through the facilities of any broadcast station," "a communication which constitutes an expenditure or independent expenditure[1] under the Act," and "a candidate debate or forum." § 434(f)(3)(B)(i), (ii) and (iii).

In their explanations that the "electioneering communication" prohibition was not intended to encompass grassroots lobbying, the Congressional sponsors never referred to anything outside the content of the ads themselves. Sen. Jeffords assured "[a]ny organization," which includes incorporated civic groups and unions, that "*their grassroots communications*" were excluded from the prohibition. 147 Cong. Rec. S2813 (emphasis added). Sen. Wellstone assured them that "*ads* . . . that are legitimately trying to influence policy debates" and "legitimate policy *ads*" are excepted, because the prohibition "only targets

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[1]An "independent expenditure" is an expenditure which "expressly advocates the election or defeat of a clearly identified candidate." § 431(17)(A).

those *ads* that we all know are trying to skew elections." 147 Cong. Rec. S2846 (emphasis added).

When the FEC considered exceptions to the "electioneering communication" prohibition in 2002, it solicited comments on four proposed alternatives for a grassroots lobbying exemption. 67 Fed. Reg. 51131. The BCRA's prime sponsors proposed to the FEC specific wording for a grassroots lobbying exemption and told the FEC that it had authority to enact their rule under BCRA. *See Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords* at 10 (attached to Letter from Sen. John McCain, Sen. Russell D. Feingold, et al. to Ms. Mai T. Dinh of the FEC (Aug. 23, 2002)) (available at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf) ("Prime Sponsors' Comments").

The BCRA prime sponsors saw the difference between electioneering and grassroots lobbying as hinging entirely on the content of the ad itself:

> The term "electioneering communication" does not include any communication that:
>
> ****
>
> (x)(A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter; (ii) the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; and (iii) the communication refers to the candidate only by use of the term "Your Congressman," "Your Senator," "Your Member of Congress" or a similar reference and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the

> communication contains no reference to any political party.
>
> (B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate's record or position on any issue; (ii) the candidate's character, qualifications or fitness for office; or (iii) the candidate's election or candidacy.

Prime Sponsors' Comments at 10. The FEC, however, failed to adopt any grassroots lobbying exception.

This Court reviewed the constitutionality of the "electioneering communication" prohibition, in *McConnell v. FEC*, and upheld it on its face because it was not substantially overbroad. 540 U.S. 93, 206-07 (2003). This Court "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," noting that the interests that support the BCRA "set[ ] it apart from the statute in *Bellotti* . . . and . . . *McIntyre*." 540 U.S. at 206 n.88. *First National Bank v. Bellotti*, 435 U.S. 765 (1978), and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) involved grassroots lobbying rather than attempts to influence candidate elections.

This case presents the issue reserved in *McConnell*, whether the interests that support regulation of election-related speech are sufficient to also prohibit grassroots lobbying about upcoming votes in Congress. In the case's first trip to this Court, the Court held unanimously that neither the language nor the logic of *McConnell* precluded an as-applied challenge to the "electioneering communication" prohibition and remanded the case for a decision on the merits of Wisconsin Right to Life, Inc's ("WRTL") as-applied challenge. *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006) (per curiam) ("*WRTL I*").

The BCRA sponsors (as intervening defendants here) and the FEC appeal the lower court's decision, on remand, that the electioneering communication prohibition is unconstitutional as

applied to WRTL's 2004 grassroots lobbying ads because "[i]n so concluding, the district court . . . focused solely on the face of the advertisements." Intervenors' JS at 2-3; *see also* FEC's JS at 16-17. The FEC wants the courts to examine external events to ferret out the subjective intent of WRTL in running the ads and their possible electoral effect, FEC's JS at 20-24, and the sponsors-Intervenors now argue that a grassroots lobbying exemption depends, not on the content of the ads, but on "the context of the Wisconsin senatorial race," including previous public statements by WRTL and its PAC, an expert's judgment as to the importance of the issue addressed in grassroots lobbying in the coincident election, the fact that the issue was mentioned in a poll taken by the Republican Party of Wisconsin, and other external factors. Intervenors' JS at 11, n.3. According to the dissenting Judge below, this will require a trial on the merits to resolve. *See* App. at 30a, 45a, 46a, 47a-48a.

When it was before this Court in *WRTL I*, the FEC denied that a communication's potential effect on an election gave it the power to prohibit it,[2] and the Intervenors' current position contradicts their assurances from the floor of Congress and is contrary to the exemption for grassroots lobbying that they themselves proposed in the 2002 FEC rulemaking.

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[2]In oral argument in *WRTL I*, Justice Scalia asked: "You think Congress has the power to prohibit any First Amendment . . . conduct that might have an impact on the election? I mean, is that the criterion for whether it . . . can be prohibited?" Transcript of Oral Argument at 31, *WRTL I*, 126 S. Ct. 1017 (No. 04-1581). The Solicitor General responded: "No, Justice Scalia, it's not. . . ." *Id.*

Discussion

This Court Should Note Probable Jurisdiction.

WRTL agrees that probable jurisdiction should be noted. A substantial question of federal law is raised by this case. A federal statute has been declared unconstitutional as applied to three grassroots lobbying ads that WRTL wished to run in 2004.[3] More importantly, the as-applied exception to the "electioneering communication" prohibition, announced by the lower court, is important to incorporated citizen groups and labor unions who wish to engage in grassroots lobbying during the "electioneering communication" period, a situation likely to regularly recur. *See* App 15a (citing *McConnell v. FEC*, 251 F. Supp. 2d 176, 793 (2003) (Leon, J.)).

A. The Lower Court Correctly Held That the "Electioneering Communication" Prohibition Could Not Be Constitutionally Applied to WRTL's Grassroots Lobbying Ads.

WRTL agrees that, as the lower court held, the Constitution precludes applying the "electioneering communication" prohibition to the three specific ads that WRTL wished to run in 2004, i.e. the "Wedding," "Loan," and "Waiting" ads. App. 3a-5a n.3, 4, and 5, respectively. "[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies," *Bellotti*, 435 U.S. at 791 n.31, and this

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[3]A second question is whether the familiar "capable of repetition yet evading review" exception to mootness applies in a challenge to the electioneering communication's application to grassroots lobbying. In September, 2006, "confronted with essentially the same issue," another three judge court in *Christian Civic League of Maine, Inc. v. FEC* held that the exception did not apply. App. 14a n.14. The lower court here "respectfully disagree[d]" with the holding by that court. That question is not specifically raised here and would best be answered by the Court in the *Christian Civic League of Maine, Inc. v. FEC* case. No. 06-589.

Court has not found any governmental interest sufficient to prohibit it. *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961); *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002); *see also California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("the right to petition extends to all departments of the government"). Furthermore, grassroots lobbying ads are a type of genuine issue advertising, which is not the functional equivalent of express advocacy, as the district court correctly held. *See* App. 25a.

The lower court was also correct when it "limit[ed] its consideration to language within the four corners of the anti-filibuster ads," App. 22a, to determine whether the ads should be exempt from the prohibition. The court was doing exactly what Congress itself did in defining an "electioneering communication" and what the BCRA sponsors, now Intervenors, did in crafting their own proposed grassroots lobbying exception to the prohibition. Both looked only at the content of the communication.

Furthermore, this Court has long rejected the notion that the intent or effect of a communication can be the basis of prohibiting it since this would make speech dependent on the hearers' subjective judgment:

> (W)hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. . . . Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley v. Valeo, 424 U.S. 1, 43 (1976) (internal quotation marks and citation omitted). This applies equally to grassroots lobbying, which is "'a concerted effort to influence public

officials *regardless of intent or purpose.*'" *BE & K*, 536 U.S. at 525 (*quoting Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965)) (emphasis added).

B. A Decision from Which General Guidance Can Be Derived Is Needed from this Court.

If the Court agrees with the lower court's decision, incorporated citizen groups, labor unions, and the courts will greatly benefit from this Court's decision before the next blackout period begins. A decision from this Court would likely set out the critical factors for a broadcast ad to qualify for a grassroots lobbying exception so that the regulated public would know with some certainty the circumstances under which they may now use broadcast ads to lobby members of Congress about upcoming votes in Congress. This Court has done so in the past. *See, e.g.*, *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 263-64 (1986) ("*MCFL*") (holding of general applicability as to MCFL-corporations, which are exempt from the corporate prohibition).

Without such a holding, incorporated citizen groups and labor unions seeking protection for materially-similar ads must bring "as-applied challenges . . . on an emergency basis."App. 18a. *See also id.* at 19a ("as-applied challenges, to be effective, must be conducted during the expedited circumstances of the closing days of a campaign."). "The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." *Storer v. Brown*, 415 U.S. 724, 738 n.8 (1974). Likewise, a decision from this Court from which general guidance could be derived will inform any efforts by the FEC to promulgate a rule exempting grassroots lobbying such as WRTL's from regulation under the "electioneering communication" prohibition. *See WRTL I*, 126 S. Ct. at 1017 ("Although the FEC has statutory

authority to exempt by regulation certain communications from BCRA's prohibition on electioneering communications, § 434(f)(3)(B)(iv), at this point, it has not done so for the types of advertisements at issue here.").

C. This Court Should Review Whether the Scope of the Exception Announced Below Is Constitutionally Sufficient.

As to the scope of the exception required by the Constitution, the lower court gave well-reasoned guidance to citizen groups, unions, and other courts as to the applicability of the exception it has announced, such as limiting the constitutional evaluation of the ads in question to their four corners, App. 18a-22a, and the criteria used to establish that the ads were not the functional equivalent of express advocacy. App. 22a-24a. But this Court, as the final arbiter of the Constitution's requirements, should review the lower court's analysis to make sure that the exception for grassroots lobbying created by its analysis comports with the protection afforded speech and the right to petition by the First Amendment.

Conclusion

This Court should note probable jurisdiction. The briefing schedule should allow the Court to reach its decision this term.[4]

Respectfully submitted,

M. Miller Baker
Michael S. Nadel
McDermott Will & Emery LLP
600 Thirteenth Street, NW
Washington, DC 20005
202/756-8000
202/756-8087 (facsimile)
Counsel for Appellee

James Bopp, Jr.,
Counsel of Record
Richard E. Coleson
Bopp, Coleson & Bostrom
The James Madison Center for Free Speech
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434
812/235-3685 (facsimile)
Lead Counsel for Appellee

[4]In this regard, WRTL agrees with the proposed briefing schedule outlined in footnote 1 of Response of the Federal Election Commission to Appellee's Motion to Expedite and to Advance on the Docket.

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v.

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SENATOR JOHN MCCAIN, ET AL., APPELLANTS

v.

WISCONSIN RIGHT TO LIFE, INC.

ON APPEALS
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL ELECTION COMMISSION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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REPLY BRIEF FOR THE FEDERAL ELECTION COMMISSION

A. Appellee's As-applied Challenge Is Moot

The Commission's opening brief explains (at 21-25) that this case is moot because (1) no live controversy exists with respect to the specific ads that appellee proposed to run in 2004, and (2) appellee has neither alleged nor demonstrated an intent to run ads having the characteristics that the district court found dispositive for purposes of the constitutional analysis. Appellee contends (Br. 28) that, for purposes of the "capable of repetition, yet evading review" exception to general mootness principles, "[t]he alleged illegal action will recur when [appellee] wishes to run a targeted broadcast ad mentioning a candidate within the prohibition period," whether or not the future ad is otherwise comparable to the ads that are the subject of this suit. That is incorrect.

Appellee has brought and preserved an as-applied challenge to the application of Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91, to three specific ads. In upholding that challenge, moreover, the district court articulated a test that focused on the text of the ads and implied that the statute would be valid as applied to ads that differed in their particulars, for example, by promoting or attacking a candidate. See J.S. App. 22a. Accordingly, appellee must show that the "same controversy" will recur. See Gov't Br. 22-24. A vague intent to broadcast ads subject to BCRA § 203 does not suffice.

If appellee had alleged and demonstrated an intent to engage in *express advocacy* during a future pre-election period, that prospect would not give rise to the same controversy that is presented here. Appellee is therefore wrong in arguing (Br. 28) that the "capable of repetition" prong of the exception

can be satisfied simply by evidence that appellee "wishes to run a targeted broadcast ad mentioning a candidate within the prohibition period." That general averment might be enough if this case involved a *facial* challenge, since such evidence would demonstrate appellee's continuing practical interest in the question whether BCRA § 203 can be enforced *at all*. Evidence at that level of generality, however, is insufficient to establish the requisite ongoing case or controversy with respect to the as-applied challenge presented here.

Appellee notes (Br. 26 n.32) that this Court in *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974), while acknowledging that the "capable of repetition, yet evading review" exception is "typical[ly]" implicated only in facial challenges, held that the doctrine can be invoked in as-applied challenges. The doctrine's invocation in as-applied challenges remains the exception rather than the rule, however, precisely because an as-applied challenge is more likely to turn on factors particular to a specific application of the statute, making it unlikely that the "same controversy" will recur. Moreover, the nature of the as-applied challenge will affect the likelihood of such a recurrence. For example, while the as-applied challenge in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251-263 (1986) (*MCFL*), arose in the more traditional enforcement context and therefore posed no mootness problem, the challenge there, which turned on the nature of the organization rather than on the content of particular ads, was relatively likely to recur. An organization's structure and willingness to accept corporate contributions may not change from election to election, but the nature of ads concerning a diverse range of public issues that may gain salience during future elections almost certainly will change. In light of the number of forms that future ads could take—from avoiding invoking a candidate's name altogether to criticizing the candidate

directly, or even including express advocacy—it is purely speculative that the same controversy will recur.

In addition to its as-applied challenge with respect to three specific ads, appellee also brought a broader challenge to BCRA's application to so-called "grassroots lobbying." While that broader challenge might have been more likely to recur, the district court found it non-justiciable on other grounds, see J.S. App. 15a-16a, and appellee did not cross-appeal that ruling. Having declined to cross-appeal, appellee cannot invoke its general interest in continuing to engage in grassroots lobbying to keep alive a controversy that is limited to three ads that will almost certainly never run again. Subsequent issues may arise in close proximity to a future election; in addressing those issues, appellee may decide it is necessary to refer to a candidate in the election, and it may further decide to use a targeted broadcast ad. But adding the further speculation that those ads will share the same textual features that the district court found dispositive here is far too speculative. Under these circumstances, the as-applied challenge that appellee has brought and preserved is moot and does not fall within the exception for cases capable of repetition yet evading review.[1]

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[1] Appellee also relies (Br. 27-28) on the Court's conclusion that the issue in *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), was capable of repetition yet evading review. But the differences between this case and *Bellotti* are revealing. The challenge in *Bellotti* did not turn on the text of the particular ads, but was directed at the complete ban on corporate participation in most referenda campaigns. See *id.* at 767-770. Any effort by the corporations to take part in the next tax referendum—through any kind of ad in any medium—would have triggered the ban. Moreover, the plaintiffs in *Bellotti* were explicit about their continued interest in participating in elections. Here, by contrast, appellee's challenge is premised on a lack of intent to influence elections as such. Appellee's stated interest is in legislative issues that may or may not arise in close conjunction with candidate campaigns. It is speculative whether appellee's desire to address such issues will prompt it to run ads that

B. Appellee's Argument Is Fundamentally Inconsistent With This Court's Decision In *McConnell* v. *FEC*

In *McConnell* v. *FEC*, 540 U.S. 93 (2003), this Court held that BCRA § 203 is constitutional on its face, 540 U.S. at 203-209, and the Court indicated that the financing restrictions imposed by that provision are valid at least in the "vast majority" of their applications, see *id.* at 206. Although this Court subsequently clarified that *McConnell* did not foreclose as-applied challenges, see *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410, 411 (2006) (*WRTL I*) (per curiam), the Court in *WRTL I* did not cast doubt on any aspect of *McConnell*'s reasoning. Appellee's argument in support of its as-applied challenge is fundamentally inconsistent with this Court's analysis in *McConnell*.

1. Appellee asserts (Br. 29) that "this case involves a *prohibition* that substantially burdens the people's rights to self-government using their liberties of expression, association, and petition" (footnote omitted). The Court in *McConnell* explained, however, that "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance ads expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." 540 U.S. at 203; see Gov't Br. 3-4. The Members of this Court divided on the question whether Congress's authority to regulate corporate campaign spending encompasses "electioneering communications," as defined in BCRA, when those ads do not contain express electoral advocacy. An unchallenged premise of the Court's decision, however, was that Congress has greater power to regulate corporate electoral spending than to regulate comparable advocacy by individuals or unincorporated entities. Appellee's effort (*e.g.*, Br. 1) to

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trigger BCRA, let alone ads that share the textual features that the district court found dispositive here. See Gov't Br. 24-25.

analogize BCRA § 203 to past restrictions on the speech of individuals is therefore misconceived.

Appellee's characterization (Br. 29) of BCRA § 203 as a "*prohibition*" on speech is, to use the Court's words in *McConnell*, "simply wrong." As the Commission's opening brief explains (at 7), corporations are permitted under BCRA (as under prior law) to finance electoral advocacy through a separate segregated fund, commonly known as a political action committee or PAC. The Court in *McConnell* therefore observed that "it is 'simply wrong' to view * * * [BCRA § 203] as a 'complete ban' on expression rather than a regulation." 540 U.S. at 204 (quoting *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003)); see *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990). The Court in *McConnell* further explained that "corporations and unions may finance genuine issue ads during [pre-election] timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U.S. at 206. Although appellee contends (Br. 33-35) that the PAC alternative is burdensome and inadequate, it makes no effort to reconcile that position with the *McConnell* Court's evident conclusion that the availability of that option substantially affects the constitutional analysis.

2. Appellee's arguments are inconsistent with *McConnell* at more fundamental levels as well. Based on an extensive evidentiary record, the Court in *McConnell* concluded that the "vast majority" of pre-BCRA ads falling within the statutory definition of "electioneering communication" had an "electioneering purpose." 540 U.S. at 206.[2] The Court re-

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[2] The Court also noted that, "whatever the precise percentage may have been in the past," corporations and unions that do not seek to affect electoral results can adjust their advertising practices to BCRA's requirements by "simply avoiding any specific reference to federal candidates." *McConnell*, 540 U.S. at 206. The Court's evident expectation was that, now that BCRA is in

jected the plaintiffs' overbreadth challenge to BCRA § 203 and concluded that, "[f]ar from establishing that BCRA's application to pure issue ads is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion." 540 U.S. at 207. Obviously, any constitutional exemption from BCRA § 203 that encompasses a substantial percentage of ads falling within the statutory definition of "electioneering communication" would be irreconcilable with this Court's determination that BCRA § 203 is valid in the "vast majority" of its applications.

But appellee's proposed test, like that adopted by the district court, would have precisely that forbidden effect. Appellee does not demonstrate that its own ads are atypical of "electioneering communications" generally, or that the exemption it seeks would encompass only an insubstantial percentage of communications falling within the statutory definition. To the contrary, appellee's own ads, as well as the broader class of ads that appellee seeks to exempt, closely resemble ads that the Court in *McConnell* identified as *paradigmatic* abuses under pre-BCRA law.[3]

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effect, an *even larger* percentage of ads falling within the statutory definition of "electioneering communication" will reflect an electoral purpose.

[3] Of course, the *clearest* example of an election-oriented ad is one that expressly advocates the election or defeat of an identified candidate. At the time of BCRA's enactment, however, "very few ads—whether run by candidates, parties, or interest groups—used words of express advocacy. In the 1998 election cycle, just 4% of candidate advertisements used magic words; in 2000, that number was a mere 5%." *McConnell*, 540 U.S. at 127 n.18 (citations omitted); see *id.* at 193 & n.77. Thus, the fact that appellee's ads contained no express electoral advocacy does not take them out of the heartland of Congress's concern. As the *McConnell* Court clearly recognized, the fact that the "express advocacy" test failed to capture the large majority of candidates' *own* ads made it woefully underinclusive. But as amici League of Women Voters, et al., explain (Br. 15-25), appellee's proposed test would allow corporations to

As a core example of the types of ads that had been used to circumvent pre-BCRA restrictions on corporate electioneering, the Court described a hypothetical ad that "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-127. Appellee's ads differ from the "Jane Doe" hypothetical only in that those ads, rather than explicitly condemning Senator Feingold's record on the issue of judicial filibusters, criticize a "group of Senators" (see J.S. App. 67a, 69a), which many listeners would know included Senator Feingold, and direct viewers and listeners to a website that makes that link explicit and contains such criticisms. See Gov't Br. 45. Under appellee's proposed constitutional test, moreover, a purported "issue ad" can be exempt from BCRA § 203 even if the ad itself explicitly criticizes a candidate's position. See Appellee Br. 56-57.[4] Because the constitutional exemption that appellee advocates would encompass a *substantial percentage*—probably the vast major-

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run ads that are functionally equivalent to some of the most famous and effective *candidate* ads ever produced.

[4] Appellee contends that BCRA § 203's financing restrictions cannot constitutionally be applied to an ad that (1) "focuses on a current legislative branch matter, takes a position on the matter, and urges the public to ask a legislator to take a particular position or action with respect to the matter in his or her official capacity"; and (2) "does not mention any election, candidacy, political party, or challenger, or the official's character, qualifications, or fitness for office." Appellee Br. 56 (footnote omitted). Appellee states that, so long as those criteria are satisfied, the ad is entitled to a constitutional exemption even if it "states the position of the candidate on the matter * * * and praises or criticizes the candidate for that position." *Id.* at 57. Appellee asserts (*id.* at 56 n.66) that, because its proposed constitutional test requires a reference to a "current" legislative matter, the test is consistent with the *McConnell* Court's recognition that the "Jane Doe" ad had an electioneering purpose. The Court in *McConnell*, however, did not describe the "Jane Doe" ad as referring to a stale legislative issue, let alone suggest that this was the only feature that marked the hypothetical ad as election-oriented.

ity going forward—of ads falling within BCRA's definition of "electioneering communication," including ads indistinguishable from the Court's "Jane Doe" example, it cannot be reconciled with the *McConnell* Court's rejection of plaintiffs' facial challenge to BCRA § 203.[5]

Moreover, the inconsistency between appellee's position and the Court's conclusion in *McConnell* that the "vast majority" of BCRA § 203's applications are valid becomes even clearer when the prospective effects are considered. In *McConnell*, the Court recognized that, due to the bright-line nature of BCRA's definition of "electioneering communication," corporations interested in running "pure issue ads" could avoid the application of BCRA § 203 prospectively. See 540 U.S. at 206-207. Conversely, any bright-line "magic feature" exception, like the district court's, that places no weight on contextual indicators of electioneering purpose would open the door for massive circumvention of BCRA's financing restrictions. The Court's experience with the "express advo-

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[5] Appellee places substantial weight on the alleged similarities between the ads at issue here and an ad that appellee refers to as the "PBA ad," which was mentioned by the district court in *McConnell* but was never addressed by this Court. Contrary to appellee's contention (Br. 56), the "PBA ad" is not a "logical prototype" for an as-applied constitutional exemption. The much more logical prototype for consideration of appellee's as-applied challenge is the "Jane Doe" ad that was specifically referenced in this Court's opinion, which the Court clearly understood to have an electioneering purpose. If anything, the PBA ad is an example of ads that serve more than one purpose and was difficult to classify under a binary methodology. Two defense witnesses in *McConnell*, asked to consider the text of the "PBA ad" without reference to context, expressed differing views about whether the ad was *primarily* electoral or *primarily* legislative. See *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 312 (D.D.C. 2003) (Henderson, J.); *id.* at 748 (Kollar-Kotelly, J.). Neither witness opined that the ad wholly lacked an electioneering component. Now that BCRA is on the books, corporations that intend to influence both elections and issues can either avoid the temptation to link the issue to an identified candidate or finance the ad through a PAC.

cacy" test amply demonstrates the willingness and ability of corporations and unions to take advantage of loopholes or underinclusive bright-line rules. Going forward, the "vast majority" of ads with an electioneering purpose and effect could be designed to fall within the as-applied exceptions recognized by the district court and proposed by appellee. That would clearly turn *McConnell* on its head.

3. Based on a voluminous record, the Court in *McConnell* rejected the plaintiffs' overbreadth challenge. Despite that holding, appellee argues (*e.g.*, Br. 29, 32, 33) that the government bears the burden of proving the electoral focus of the specific ads at issue here. By contending that the application of BCRA § 203's financing restrictions to particular "electioneering communications" cannot be treated as presumptively constitutional, appellee argues in effect that its as-applied challenge should be adjudicated as if *McConnell* had never happened. The Court surely did not intend that its analysis and holding in *McConnell* would be disregarded in such a manner.

It is also unclear *how* the government could satisfy its burden under appellee's theory of the case. Until Congress enacted BCRA's "electioneering communications" provisions, which identify specific objective criteria that indicate electoral intent and effect, this Court had addressed potential vagueness concerns by construing prior campaign-finance laws as reaching only express electoral advocacy. See *McConnell*, 540 U.S. at 190-192. The Court in *McConnell* made clear that "the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law," *id.* at 190, and that Congress may adopt a different standard so long as its test is neither vague nor overbroad, see *id.* at 192. But if the government in each as-applied challenge must prove the electioneering character of the particular ad at issue, without reference to the congres-

sional judgment reflected in BCRA's definition of "electioneering communication" and without reintroducing vagueness concerns, it is difficult to see what standard *other than* the "express advocacy" test a reviewing court could employ. Adoption of appellee's proposed approach would therefore effectively negate this Court's holding in *McConnell* that Congress's power to restrict corporate electioneering extends beyond regulation of express advocacy.

4. Appellee appears to contend (*e.g.*, Br. 59-61) that, because of the importance of "grassroots lobbying" to a functioning democracy, BCRA § 203 cannot constitutionally be applied to appellee's ads even if those ads were intended to influence federal elections. That claim is also foreclosed by *McConnell*. Corporate electioneering has historically been subject to greater restrictions than other corporate speech, not because speech concerning candidate elections is entitled to reduced constitutional protection, but because corporate electoral advocacy poses distinct dangers to the democratic process. See *McConnell*, 540 U.S. at 115-117, 205; accord, *e.g.*, *Beaumont*, 539 U.S. at 152-156; *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 208-209 (1982). The interest in preventing corporate wealth from exercising untoward influence on candidate elections has consistently been recognized as compelling, see *McConnell*, 540 U.S. at 205, and it is not diminished by the fact that a particular effort at electoral influence also contains a "grassroots lobbying" component. See *id.* at 206 ("The justifications for the regulation of express advocacy apply equally to [issue] ads aired during [the 30- and 60-day pre-election] periods if the ads are intended to influence the voters' decisions and have that effect.").

5. Appellee contends (Br. 45-46) that effective "grassroots lobbying" requires that an ad name the candidate to whom constituents' communications should be addressed, and that BCRA § 203 therefore renders corporate "grassroots lobby-

ing" infeasible during the 30- and 60-day pre-election periods. That argument is not new. In *McConnell*, various plaintiffs similarly contended that BCRA's "electioneering communications" provisions are unconstitutional because BCRA's definition of that term would encompass ads urging citizens to contact their elected representatives regarding pending legislative issues. See, *e.g.*, Br. of AFL-CIO at 19 (No. 02-1755); Br. of Senator Mitch McConnell et al. at 50-52 (No. 02-1674 et al.). In response to the government's contention that effective issue advocacy does not require references to specific candidates, the AFL-CIO's reply brief in that case relied (at 2-3) on testimony from the organization's public affairs director that "naming a federal *officeholder* * * * in broadcast advertisements is often necessary in order effectively to influence his or her conduct and the issue debate."

Despite those arguments, this Court held in *McConnell* that any overbreadth in the statutory definition of "electioneering communication" was unproblematic because, *inter alia*, an advertiser who does not seek to influence federal elections "may finance genuine issue ads during [the pre-election] timeframes by simply avoiding any specific reference to federal candidates." 540 U.S. at 206. The Court thus evidently concluded that, at least as a general matter, omission of references to identified federal candidates will not preclude effective issue advocacy. Because appellee does not contend that its own circumstances were unique in that respect—*i.e.*, that appellee had a *particular* need to identify Senator Feingold in its broadcast ads—appellee's argument adds nothing to what was before this Court in *McConnell*. Moreover, the reality that other organizations' efforts to engage in grassroots lobbying on the filibuster issue outside the context of pending candidate elections did *not*, in fact, refer to specific federal officeholders, J.A. 45-46, underscores that the Court's conclusion in *McConnell* is fully applicable here.

6. Appellee contends (Br. 47-48) that Congress might have employed the "less restrictive means" of requiring "electioneering communications" to be financed from a "segregated bank account" containing only funds raised from individuals, rather than from a PAC (which is subject to additional restrictions). Appellee did not finance the ads at issue here through such an account, however, and instead used substantial donations from business corporations. See Gov't Br. 11. Appellee's contention that Congress ought to have made the segregated-account alternative available is therefore irrelevant to the question whether BCRA § 203 is constitutional as applied to appellee's own conduct. For that reason, appellee is not even in a position to advance the argument urged by a number of its amici that the Court should strike down BCRA § 203 in favor of the segregated-account approach. In any event, Congress chose to require nonprofit corporations other than "*MCFL* organizations" (see Gov't Br. 4-5) to finance "electioneering communications" through a PAC. Congress specifically rejected the alternative that appellee proposes, and this Court upheld that choice in *McConnell*. See 540 U.S. at 209-211.

C. Appellee's Reliance On *MCFL* Is Misplaced

Appellee states (Br. 43) that "this case is like" *MCFL*, in which the Court held that a narrowly defined class of nonprofit corporations (see Gov't Br. 4-5) were entitled to a constitutional exemption from the federal ban on the use of corporate treasury funds to finance express electoral advocacy. Appellee's reliance on *MCFL* is misplaced.

Appellee suggests (Br. 42-43) that the Court in *MCFL* placed on the government the burden of establishing that the challenged financing restriction was constitutional as applied to MCFL's communications. As the Commission's opening brief explains (at 34-35), *MCFL* in fact stands for the opposite

proposition. The Court in *MCFL* stated that it would "not second-guess a decision to sweep within a broad prohibition activities that differ in degree, but not kind," and it sustained the organization's as-applied challenge only after concluding that "the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL." 479 U.S. at 263. Far from requiring the government to establish the law's validity as applied to a particular entity, the Court required MCFL to show that its campaign spending would *not* implicate the concerns at which the challenged statutory provision was addressed.

Appellee relies in particular (Br. 43, 49) on this Court's statement in *MCFL* that "the desire for a bright-line rule" was not a sufficient justification for declining to recognize a constitutional exception to the statutory ban on corporate express advocacy. See 479 U.S. at 263. But the Court made that statement only *after* finding that MCFL posed *none* of the concerns that motivated the statutory prohibition, and the Court made clear that it would uphold the bright-line approach if the difference were a matter of degree, not kind. Taken as a whole, the Court's opinion in *MCFL* establishes that appellee bears the burden of showing that there exists a class of "electioneering communications" for which electoral intent and effect are demonstrably lacking, and that its own ads fall within that category. Cf. *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982) (allowing as-applied challenge for "minor political party that can show" atypical hardship from compelled disclosures).

D. The District Court Erred In Refusing To Consider Evidence Outside The Four Corners Of Appellee's Ads

Contrary to appellee's suggestion (Br. 36), the government does not advocate "an intent-and-effect test warranting a broad contextual investigation into the speaker's alleged

true purpose." The Commission's opening brief explains (at 19, 42-43) that, in light of the difficulties inherent in an unstructured post hoc inquiry into an advertiser's likely purpose, courts should adhere as closely as possible to the bright-line definition of "electioneering communication" that Congress adopted. Because appellee bears the burden of showing that Congress's generalization is inaccurate with respect to appellee's own ads—*i.e.*, that those ads demonstrably *lack* an electioneering purpose—appellee cannot prevail on the theory that electoral intent is unknowable. See Gov't Br. 42.

In any event, appellee, like the district court, is wrong to posit a stark choice between an inquiry strictly limited to the text of the ads and a full-blown and far-reaching inquiry into intent. That is a false dichotomy. It ignores a reasonable middle ground that this Court itself has repeatedly invoked in its campaign-finance decisions—viz., a focused and limited consideration of not just text, but context. Among the most important contextual features is the timing of an ad vis-a-vis an election. Not only is that contextual factor central to BCRA's definition of "electioneering communication," but this Court in *McConnell* pointed to the timing of so-called issue ads pre-BCRA—almost all within 60 days of an election—as "confirm[ing]" the Court's "conclusion that such ads were specifically intended to affect election results." 540 U.S. at 127. In other contexts as well, the Court has pointed to contextual factors in applying the campaign-finance laws. In *MCFL*, for example, the Court relied on the extraordinary circulation of the voter guide at issue to conclude that it did not qualify as an internal newsletter. 479 U.S. at 250-251.

1. This case does not require the Court to fashion a general standard for assessing as-applied constitutional challenges to BCRA § 203, or to adopt a test that makes any particular contextual factors determinative. Indeed, the primary

relevance of the strong contextual indications of electioneering purpose here is to make clear that any tests—like those adopted by the district court and proposed by appellee—that exempt ads without regard to such contextual indications will open up the statute to massive circumvention. See pp. 17-18, *infra*. In any event, three readily administrable contextual factors weigh strongly against appellee's as-applied challenge here.

First, the ads' specific and repeated cross-reference to a website that explicitly criticized Senator Feingold's position on judicial filibusters is relevant to this as-applied constitutional challenge.[6] That is particularly true here because the "BeFair.org" website was the only source referenced in the

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[6] The Commission's opening brief explains (at 43-45) that appellee's ads repeatedly urged viewers and listeners to visit the "BeFair.org" website, which contained materials disparaging Senator Feingold's record on the issue of judicial filibusters. That brief observes (at 44) that "[a] court could not cogently assess the likely purpose and effect of a broadcast advertisement urging viewers to 'look at the billboard on Main and First Streets' without examining the billboard's message." Although appellee does not specifically address that hypothetical, the logic of its position suggests that the court in an as-applied challenge involving a broadcast ad that cross-referenced such a billboard should ignore the billboard's content. See Appellee Br. 58 n.68. Of course, the position of the district court is even more ambitious because it treats the absence of language from the ad itself as an affirmative virtue, see J.S. App. 22a-23a, but then would ignore the fact that the thrice-referenced website supplies the missing language. Appellee contends (Br. 58 n.68) that its own ads are analogous to ads that simply urge individuals not to vote until they have visited a website that discusses candidates' positions on issues of concern. But unless a broadcast ad itself refers to a clearly identified candidate for federal office, it does not fall within the statutory definition of "electioneering communication," and a court will have no occasion to decide whether BCRA § 203 is constitutional as applied, regardless of what non-broadcast communications the ad references. Likewise, if appellee had avoided the reference to Senator Feingold and had directed listeners and viewers to visit its website to find out how to stop the filibusters, it would have avoided the application of BCRA § 203 altogether.

ads that provided contact information for the Senators, even though such information is a logical component of any grassroots lobbying ad. Second, it is relevant that appellee itself, during the same election cycle, had opposed Senator Feingold's reelection and had identified filibusters as a campaign issue.[7] Third, just as the proximity of ads to elections provides contextual evidence of an electioneering purpose, the timing of appellee's ads vis-a-vis legislative votes undermines appellee's claim of a lobbying rather than electoral motive.[8]

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[7] As Judge Roberts's dissent in the district court explained, appellee had "made the defeat of [Senator] Feingold a priority" during the 2004 election cycle; had "endorsed through its PAC three of Senator Feingold's main opponents"; and had treated "Senator Feingold's participation in judicial filibustering" as "a particular focus of criticism." J.S. App. 41a-42a (internal quotation marks omitted). That pattern of advocacy does not wholly foreclose the possibility that appellee could run a different ad that named Senator Feingold but was not intended to influence the election. Appellee's sustained opposition to Senator Feingold's reelection effort, however, is directly relevant to the determination whether appellee has proved the absence of electioneering intent with respect to the ads at issue here.

[8] Appellee began its advertising campaign shortly after the Senate had departed for a lengthy recess, and it did not resume its anti-filibuster ads after the 2004 election, even though the issue gained even greater public prominence during the first half of 2005. See Gov't Br. 45-46. It is undisputed that no judicial filibuster votes occurred between the commencement of appellee's advertising campaign and the 2004 general election. See J.A. 30. Although appellee asserts that additional filibuster votes were anticipated during the fall of 2004 (Br. 15 & n.24), the evidence indicates that the timing of the ads was determined well in advance without reference to the legislative schedule (see Gov't Br. 11 n.3), and the district court made no effort to determine whether the ads were reasonably timed to achieve their purported lobbying objective. Appellee further contends (Br. 16) that "there was no reason for [it] to run ads" during early 2005 because the relevant issue then was whether Senate rules should be changed, not whether Wisconsin's Senators should support individual filibusters. But appellee used *non-broadcast* communications in March 2005 to encourage supporters to "contact Senators Kohl and Feingold and urge them to allow an up and down vote on ALL judicial nominees." J.A. 92. Moreover,

Consideration of such factors would not complicate the inquiry unduly and would significantly reduce the danger that a constitutional exception to BCRA § 203 will facilitate corporate electioneering.

2. Although BCRA's definition of "electioneering communication" is simple and objective, Congress in formulating that definition conducted extensive hearings and considered a wealth of evidence. In identifying the characteristics that would trigger BCRA § 203's financing restrictions, Congress considered the advertising practices used to circumvent pre-BCRA restrictions on corporate electioneering. This Court likewise reviewed a voluminous record before concluding that BCRA's "electioneering communication" provisions are valid on their face.

As those modes of analysis make clear, determining the proper statutory or constitutional rule may involve a complex, multi-faceted inquiry even when the resulting rule itself is simple and objective. Similarly in the present setting, this Court should consider the relevant contextual evidence in determining whether appellee's proposed test for resolving as-applied constitutional challenges (see Appellee Br. 56-57) will adequately prevent circumvention of BCRA's financing restrictions, whether or not the contextual factors described above are ultimately incorporated into any constitutional test this Court may fashion. If the proposed exception would al-

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other organizations spent significant sums on issue advertising related to judicial filibusters during the spring of 2005. See J.A. 32.

If appellee's ads were intended to affect congressional votes that ultimately did not occur, the fortuitous effect of BCRA § 203's financing restrictions (and of the district court's denial of preliminary injunctive relief, see J.S. App. 57a-71a) was to prevent appellee from wasting corporate funds on a fruitless endeavor. Appellee evidently does not regard the matter in that light, however, since it states (Br. 24) with apparent regret that it "has forever lost the opportunity to broadcast its 2004 grassroots lobbying ads."

low massive circumvention of BCRA and *McConnell*'s overbreadth ruling (which was premised on the statute's constitutionality in the "vast majority" of its applications) through ads that, as contextual factors make clear, were intended to influence a candidate election, then that is reason enough to reject the proposed exception. The contextual factors are thus relevant to rejecting this as-applied challenge even if they are not incorporated into a new as-applied test.

E. Appellee Offers No Sound Reason For This Court To Reconsider *McConnell*

The breadth of appellee's position regarding the circumstances under which as-applied challenges to BCRA § 203 should prevail leads it to the inevitable conclusion that the Court should overrule *McConnell*'s holding that BCRA § 203 is facially constitutional. None of the considerations that support a departure from customary fidelity to precedent warrants dismantling the Court's landmark decision in *McConnell* just three Terms after it was pronounced following an extraordinary sitting. Indeed, appellee makes virtually no effort to explain why *McConnell* should be overruled under "the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision." *Randall* v. *Sorrell*, 126 S. Ct. 2479, 2500 (2006) (Alito, J., concurring in part and concurring in the judgment). After receiving a 20-page extension from this Court, appellee dedicates less than two pages (Br. 68-69) to its argument that *McConnell* is not entitled to stare decisis effect. That "is reason enough to refuse" appellee's extraordinary request to overrule *McConnell*. *Ibid.*

In sustaining BCRA § 203 against a facial constitutional challenge, the Court in *McConnell* relied on three basic propositions. First, the Court reaffirmed its prior holdings that corporations may constitutionally be prohibited from using

treasury funds for express electoral advocacy. See 540 U.S. at 203. Second, the Court held that the "vast majority" of prior ads covered by BCRA's definition of "electioneering communication" had an "electioneering purpose" and were thus the "functional equivalent" of express advocacy, *id.* at 206, and that any overbreadth in the statute's coverage was therefore insubstantial, see *id.* at 207. Third, the Court held that the alternatives available under BCRA to corporations that wish to engage in issue advocacy but do not intend to influence federal elections are sufficient to allay any remaining constitutional concerns. See *id.* at 206. Appellee has identified no new evidence or other intervening development that casts doubt on any of those propositions. There is consequently no basis for appellee's contention (Br. 62-69) that *McConnell* should be overruled.

Appellee contends (Br. 62) that the government has "call[ed] into question *McConnell*'s facial upholding" of BCRA § 203 by arguing that appellee's ads are in the "*heartland*" of Congress's concern.[9] That is not a legitimate basis to revisit a precedent of this Court, especially one as recent and important as *McConnell*. The arguments of a party —which this Court is free to accept or reject—are simply not the kind of intervening development that could justify overruling a precedent. As we explain above, ads like appellee's that took the form of appeals to viewers and listeners to contact their elected representatives were the paradigmatic

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[9] Contrary to appellee's suggestion (Br. 62-63), that characterization of appellee's ads in the Commission's opening brief does not reflect a change from the government's prior litigating position. The government's brief in *WRTL I* contended (at 42 n.16) that the timing of appellee's ads "reinforces the inference that [those] advertisements were in the heartland of Congress's concern." Appellee nevertheless failed to urge the overruling of *McConnell* in *WRTL I*, or even in its response to the jurisdictional statements in the current appeals.

abuse at which BCRA's "electioneering communication" provisions were directed. If this Court agrees, then BCRA § 203 is clearly constitutional as applied to those ads, since the Court in *McConnell* held that the provision is not substantially overbroad. If the Court disagrees and concludes instead that appellee's ads are atypical of "electioneering communications" as defined in BCRA, that determination may be a basis for sustaining appellee's as-applied challenge. But either way, neither the government's argument nor the Court's agreement or disagreement with that argument would remotely call into question this Court's prior holding that BCRA § 203 is constitutional on its face.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the three-judge district court as to the claims at issue in these appeals should be vacated on the ground of mootness, and the case should be remanded with instructions to dismiss as to those claims. In the alternative, the judgment should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

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Nos. 06-969 and 06-970

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, APPELLANT

v.

WISCONSIN RIGHT TO LIFE, INC.

SEN. JOHN MCCAIN, ET AL., APPELLANTS

v.

WISCONSIN RIGHT TO LIFE, INC.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

PAUL D. CLEMENT
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Appellant in No. 06-969

SETH P. WAXMAN
Wilmer Cutler Pickering LLP
1875 Pennsylvania Ave., NW
Washington, D.C. 20006

Counsel of Record
for Appellants in No. 06-970

JAMES BOPP, JR.
Bopp, Coleson & Bostrom
1 South 6th Street
Terre Haute, IN 47807-3510

Counsel of Record
for Appellee

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04CV01260 (DBS)(RWR)(RJL)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN, ET AL.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
07/28/2004	1	COMPLAINT against FEDERAL ELECTION COMMISSION (Filing fee $ 150.) filed by WISCONSIN RIGHT TO LIFE, INC..(jf,) (Entered: 07/29/2004)
	* * * * *	
07/28/2004	3	MOTION for Three-Judge Court by WISCONSIN RIGHT TO LIFE, INC.. (jf,) (Entered: 07/29/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
07/28/2004	4	MOTION for Preliminary Injunction by WISCONSIN RIGHT TO LIFE, INC.. (Attachments: # 1 Memorandum in Support)(jf,) (Entered: 07/29/2004)
		* * * * *
07/29/2004	9	ORDER granting 3 application for Three-Judge Court; status conference set for 8/5/04 at 11:00 a.m. Signed by Judge Ellen S. Huvelle for Judge Oberdorfer on July 29, 2004. (adc) (Entered: 07/29/2004)
		* * * * *
08/12/2004	23	ORDER denying 4 MOTION for Preliminary Injunction by WISCONSIN RIGHT TO LIFE, INC., for reasons to be set forth in a forthcoming memorandum. Signed by Judge David B. Sentelle, Judge Richard W. Roberts, and Judge Richard J. Leon on 8/12/04. (whb) (Entered: 08/12/2004)

BEST AVAILABLE COPY

DATE	DOCKET NUMBER	PROCEEDINGS
08/13/2004	24	NOTICE OF INTERLOCUTORY APPEAL as to 23 Order on Motion for Preliminary Injunction by WISCONSIN RIGHT TO LIFE, INC.. Filing fee $ 255, receipt number 126826. (jf,) (Entered: 08/13/2004)
08/13/2004		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 24 Notice of Interlocutory Appeal (jf,) (Entered: 08/13/2004)
08/13/2004	25	MOTION for Preliminary Injunction *Injunction Pending Appeal* by WISCONSIN RIGHT TO LIFE, INC. (Attachments: # 1 Text of Proposed Order) (Nadel, Michael) (Entered: 08/13/2004)
08/17/2004	26	MEMORANDUM OPINION AND ORDER: Parties hereto file supplemental

DATE	DOCKET NUMBER	PROCEEDINGS
		memoranda within ten days of the date of this memorandum and order addressing the question whether this matter should be dismissed. Signed by Three Judge Panel, RICHARD J. LEON, RICHARD W. ROBERTS, DAVID B. SENTELLE on 8/17/04. (whb) (Entered: 08/17/2004)
08/18/2004	27	ORDER denying 25 MOTION for Preliminary Injunction Injunction Pending Appeal by WISCONSIN RIGHT TO LIFE, INC. Signed by Judge Richard J. Leon on 8/18/04. (whb) (Entered: 08/18/2004)
		* * * * *
09/01/2004	30	AMENDED COMPLAINT against FEDERAL ELECTION COMMISSION filed by WISCONSIN RIGHT TO LIFE, INC..(rje,) (Entered: 09/03/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
09/14/2004	31	NOTICE OF INTERLOCUTORY APPEAL as to 23 Order on Motion for Preliminary Injunction by WISCONSIN RIGHT TO LIFE, INC to U.S. Supreme Court. Filing fee $ 255, receipt number 127904. (rje,) Modified on 9/16/2004 (rje,). (Entered: 09/16/2004)
		* * * * *
09/23/2004	35	Copy of US SUPREME COURT JUDGMENT as to 31 Notice of Appeal filed by WISCONSIN RIGHT TO LIFE, INC. denying plaintiff's application of an injunction pending appeal. (Burgess, Joe) (Entered: 09/23/2004)
		* * * * *
11/09/2004	40	MANDATE of USCA (certified copy)It is hereby ordered that the motion to dismiss be granted; It is further ordered that the emergency motion for in-

DATE	DOCKET NUMBER	PROCEEDINGS
		junction pending appeal and motion to expedite disposition be dismissed as moot; USCA# 04-5292 (jsc) (Entered: 11/10/2004)
		* * * * *
03/14/2005	41	MOTION for Summary Judgment by WISCONSIN RIGHT TO LIFE, INC.. (Attachments: # 1 Memorandum in Support # 2 Statement of Material Facts)(Nadel, Michael) (Entered: 03/14/2005)
		* * * * *
03/28/2005	43	MOTION for Summary Judgment by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Text of Proposed Order) (jf,) (Entered: 03/29/2005)
		* * * * *
05/10/2005	48	MEMORANDUM AND OPINION. Signed by Three Judge Panel on 5/9/05. (whb) (Entered: 05/10/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
05/10/2005	49	ORDER DISMISSING CASE WITH PREJUDICE. Signed by Three Judge Panel on 5/9/05. (whb) (Entered: 05/10/2005)
05/12/2005	50	NOTICE OF APPEAL as to 48 49 Order Dismissing Case entered on 05/10/05 by WISCONSIN RIGHT TO LIFE, INC.. Filing fee $ 255, receipt number 134676. (Attachments: # 1 Proof of Service)(jf,) (Entered: 05/13/2005)
	* * * * *	
05/27/2005		Supreme Court of the United States Case Number 04-1581 for 50 Notice of Appeal filed by WISCONSIN RIGHT TO LIFE, INC.,. (jf,) (Entered: 05/31/2005)
	* * * * *	
02/27/2006	68	ORDER of Supreme Court of the United States (certified copy) as to 50 Notice of Appeal filed by WISCONSIN RIGHT TO LIFE,

DATE	DOCKET NUMBER	PROCEEDINGS
		INC.; It is hereby ordered and adjudged that the judgment of the court is vacated with cost and the case is remanded to the United States District Court for DC to consider the merits of appellant's challenge in the first instance; It is further ordered that the petitioner recover from the Federal Election Commission ($300.00) for cost herein expanded; USCA#04-1581 (jsc) (Entered: 03/31/2006)
		* * * * *
03/23/2006		MINUTE ORDER granting 56 MOTION to Intervene as Defedants by TAMMY BALDWIN, MARTIN MEEHAN, CHRISTOPHER SHAYS, JOHN MCCAIN. Signed by Three Judge Panel (Judge David B. Sentelle, Judge Richard W. Roberts, and Judge Richard J. Leon) on 3/23/06. (lcrjl2) (Entered: 03/23/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
09/01/2006	103	Proposed Findings of Fact by WISCONSIN RIGHT TO LIFE, INC..(Attachments: # 1 Exhibit Exhibit 2: Bailey Dep. Exh. 5# 2 Exhibit Exhibit 1: Bailey Dep. Exh. 1)(Bopp, James) (Entered: 09/01/2006)
		* * * * *
09/01/2006	104	Proposed Findings of Fact by TAMMY BALDWIN, MARTIN MEEHAN, CHRISTOPHER SHAYS, JOHN MCCAIN. (Attachments: # 1 Exhibit 1-3)(Moss, Randolph) (Entered: 09/01/2006)
09/01/2006	105	Proposed Findings of Fact by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Exhibit 70 - 103 in Support of the FEC's Motion for Summary Judgment (Volume 3))(Deeley, Kevin) (Entered: 09/01/2006)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
12/21/2006	140	ORDERED that #76 Plaintiff Wisconsin Right to Life's Motion for Summary Judgment is GRANTED; and it is further ORDERED that #81 Defendant Federal Election Commission's Motion for Summary Judgment is DENIED. Signed by Three Judge Panel on 12/21/06. (whb) (Entered: 12/21/2006)
12/21/2006	141	OPINION FOR THE COURT FILED BY DISTRICT JUDGE RICHARD J. LEON, IN WHICH CIRCUIT JUDGE DAVID B. SENTELLE JOINS IN FULL. DISSENTING OPINION FILED BY DISTRICT JUDGE RICHARD W. ROBERTS. Signed by Three Judge Panel on 12/21/06. Signed by Judge Richard J. Leon on 12/21/06. (whb) (Entered: 12/21/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
12/26/2006	142	MOTION Seeking Clarification of Decision of December 21, 2006 by FEDERAL ELECTION COMMISSION. (Mueller, Gregory) (Entered: 12/26/2006)
12/27/2006	143	MEMORANDUM re 142 MOTION Seeking Clarification of Decision of December 21, 2006 filed by FEDERAL ELECTION COMMISSION, by WISCONSIN RIGHT TO LIFE, INC.. (Bopp, James) (Entered: 12/27/2006)
12/28/2006	144	REPLY re 143 Memorandum filed by TAMMY BALDWIN, MARTIN MEEHAN, CHRISTOPHER SHAYS, JOHN MCCAIN. (Moss, Randolph) (Entered: 12/28/2006)
12/28/2006	145	ORDERED that 142 Defendant Federal Election Commission's Motion for Clarification is GRANTED. Signed by

DATE	DOCKET NUMBER	PROCEEDINGS
		Three Judge Panel on 12/28/06. (lcrjl2,) (Entered: 12/28/2006)
12/29/2006	146	NOTICE OF APPEAL as to 140 Order,, 141 Memorandum & Opinion,, 145 Order on Motion for Miscellaneous Relief by FEDERAL ELECTION COMMISSION. Fee Status: No Fee Paid. Parties have been notified. (Mueller, Gregory) (Entered: 12/29/2006)
12/29/2006	147	NOTICE OF APPEAL as to 141 Memorandum & Opinion,, 145 Order on Motion for Miscellaneous Relief by TAMMY BALDWIN, MARTIN MEEHA, CHRISTOPHER SHAYS, JOHN MCCAIN. Fee Status: No Fee Paid. Parties have been notified. (Attachments: # 1 Certificate of Service)(Moss, Randolph) (Entered: 12/29/2006)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
01/16/2007		USCA for the Supreme Court, Case Number 06-970 for 147 Notice of Appeal, filed by CHRISTOPHER SHAYS,, MARTIN MEEHAN,, JOHN MCCAIN,, TAMMY BALDWIN,. (jf,) (Entered: 01/18/2007)
01/16/2007		USCA for the Supreme Court, Case Number 06-969 for 146 Notice of Appeal filed by FEDERAL ELECTION COMMISSION,. (jf,) (Entered: 01/18/2007)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04CV1260 (DBS)(RWR)(RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT
AND
SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

FEC's Proposed Findings of Fact

[Filed: Sept. 1, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S PROPOSED FINDINGS OF FACT

Pursuant to the Court's April 17, 2006 Scheduling Order, defendant Federal Election Commission ("Commission" or "FEC") presents the following proposed findings of fact:

I. Plaintiff Wisconsin Right to Life, Inc.

1. Wisconsin Right to Life ("WRTL") describes itself as a nonprofit, nonstock Wisconsin corporation that is tax exempt under 501(c)(4) of the Internal Revenue Code. Am. Ver. Complt. ¶¶ 19, 21.

2. Wisconsin Right to Life is a "very active force in Wisconsin state politics" with "a strong grass-roots organization" which is "often effectively mobilized in elections." Defendant Federal Election Commission's Exhibit Submitted in Support of Its Motion for Summary Judgment ("Exh.") Number 1, Franklin Rep. at 9-10.

3. "[T]he influence of WRTL in turning out pro-life voters is unquestioned by state political observers." Exh. 1, Franklin Rep. at 11.

4. WRTL has approximately 500,000 supporters and approximately 52,000 of them are considered members of the organization. Exh. 1, Franklin Rep. at 9; Exh. 4, Armacost Dep. at 23.

5. WRTL administers its own separate segregated fund, the Wisconsin Right to Life Political Action Committee ("PAC"). The fund is registered with the Commission as a multicandidate political committee under the FECA. *See* Exh. 9, WRTL PAC Statements of Organization; 2 U.S.C. 431(4), 441a(a)(4), 441b(b)(2)(C).

6. WRTL has demonstrated its ability to raise substantial sums of money from its members into its federal PAC, raising nearly $155,000 during the presidential election year of 2000. Exh. 10, Lyons Aff. ¶ 7.

7. WRTL has a long history of opposition to Senator Feingold, making independent expenditures against him through its federal PAC in his 1992 and 1998 campaigns. Exhs. 11-12.

8. In 1998, WRTL spent more than $60,000 on independent expenditures that urged voters to vote against Feingold and for his opponent, including the distribution of thousands of brochures and extensive phone-calling. Exh. 11. Many of those independent expenditures men-

tioned candidates in other races as well. Exh. 11; Exh. 1, Franklin Rep. at 2.

9. WRTL and its federal PAC make the vast majority of their communications through media other than paid broadcast advertising. WRTL has a website; sends out mass emails to thousands of recipients; provides its staff for appearances on TV and radio news shows; publishes op-eds in newspapers; provides quotes for print media stories; holds press conferences; publishes a magazine; distributes brochures, church bulletins, and voter guides; sends out direct mail letters; and pays for automated telephone calls. Exh. 3, WRTL Dep. (Lyons) at 89-115.

10. WRTL had never run a TV or radio ad on the issue of judicial filibusters before it created the advertisements at issue here. Exh. 3, WRTL Dep. (Lyons) at 82.

11. Neither Wisconsin Right to Life Inc. nor its federal or state PAC had ever run any television advertising before the summer of 2004. Exh. 4, Armacost Dep. at 51, 115.

12. The only branch of the WRTL organization that had run television advertising before WRTL ran the TV ad at issue in this case was its 501(c)(3) education fund, which runs educational advertisements discouraging women from getting abortions. Exh. 4, Armacost Dep. at 12-13; WRTL, Veritas Society TV Commercials, http://www.wrtl.org/veritas_tv.htm; Exh. 3, WRTL Dep. (Lyons) at 105-06, 137.

II. The 2004 Wisconsin Senate Election Was Expected to Be Competitive, and Judicial Filibusters Were a Campaign Issue

13. Throughout most of the 2004 election cycle, Senator Feingold appeared to be vulnerable, with less than 50% approval ratings. Exh. 1, Franklin Rep. at 3-4.

14. During the fall of 2004, the widely respected *Cook Political Report* classified the race as one of the most competitive races involving a Democratic incumbent. Exh. 1, Franklin Rep. at 4-5.

15. Competitive races are far more likely to attract interest group spending, particularly expensive television advertising. *See, e.g., McConnell*, 251 F. Supp. 2d 176, 305 (D.D.C. 2003) (Henderson, J.); *id.* at 565-67, 633, 726 (Kollar-Kotelly, J.); *id.* at 878, 881, 908 (Leon, J.).

16. Four candidates vied to be the Republican challenger to Senator Feingold: Bob Welch, Tim Michels, Russ Darrow, and Robert Lorge. Exh. 1, Franklin Rep. at 5.

17. The Republican Party of Wisconsin and all four of the Republican candidates made Senator Feingold's support of filibusters against judicial nominees a campaign issue. Facts 18-28, *infra.*

18. In September, 2003, Bob Welch issued a press release harshly criticizing Senator Feingold for his participation in the "partisan filibuster" that he said led to the withdrawal of one judicial nominee. Exh. 13.

19. In press releases in September and November of 2003, Bob Welch "called on Senator Russ Feingold to end his support of the filibuster of four of President

Bush's judicial nominees" and argued that "[t]he gridlock caused by Russ Feingold's partisanship is appalling. . . . Because of his obstructionism the wheels of justice are in danger of grinding to a halt." Exh. 1, Franklin Rep. at 8.

20. On January 16, 2004, a Bob Welch press release stated that "[r]efusing to allow qualified jurists like Miguel Estrada, Priscilla Owen, Charles Pickering and others to ever have an up-or-down vote on the Senate floor is back room partisan politics at its worst." Exh. 1, Franklin Rep. at 8.

21. At the end of July, Bob Welch's campaign website noted that many "clearly qualified" judicial nominees had their nominations "stonewalled or killed by Russ Feingold" and his Senate allies. Exh. 14 at 6.

22. Tim Michels promised that he would support giving every judicial nominee a vote and asserted that "[t]his issue is rising on people's radar screens." Exh. 15 at 4.

23. Russ Darrow called Feingold "a leader in the stonewalling effort," said "it's the worst kind of politics," and argued that "[i]t's why many Americans want a new face." Exh. 15 at 4-5.

24. Darrow's website listed "not hold[ing] judicial nominations hostage" as one of his main issues. Exh. 16.

25. The Wisconsin Republican Senate candidates frequently discussed the filibuster issue at their campaign stops. Exh. 1, Franklin Rep. at 8.

26. The filibuster issue was addressed during an August 17 debate among the Republican candidates, with Robert Lorge claiming that he would be the most

effective candidate at getting judicial nominees approved. Exh. 17, Xiao Zhang, *Four Republican U.S. Senate Candidates Debate in Milwaukee*, Wis. State J. (Assoc. Pr.), Aug. 18, 2004.

27. The Republican Party of Wisconsin also highlighted Senator Feingold's "obstruction of President Bush's judicial nominees" on its website as one of four reasons "why Russ Feingold should be voted out of office." Exh. 18; Exh. 71, Plaintiff WRTL's Response to Defendants' Requests for Admissions Pursuant to the Court's Order, Response No. 23.

28. The Chairman of the Wisconsin Republican Party criticized Feingold on the filibuster issue. Exh. 15; Exh. 71, Plaintiff WRTL's Response to Defendants' Requests for Admissions Pursuant to the Court's Order, Response No. 22.

29. At campaign rallies in September and October of 2004, Vice President Cheney urged that "a good way to deal with the problem of the Democratic filibuster in the Senate is to elect some good Republicans like Tim Michels from Wisconsin." Exh. _, Plaintiff WRTL's Response to Defendants' Requests for Admissions Pursuant to the Court's Order ¶ 59; Exh. 19 at 4, Office of the Vice President, *Vice President's Remarks at a Victory 2004 Rally in Eau Claire, Wisconsin*, Sept. 28, 2004 at 5; Exh. 20, Office of the Vice President, *Vice President's Remarks in Ashwaubenon, Wisconsin*, Oct. 21, 2004, at 5.

III. One of WRTL's Two Most Important Election Priorities in 2004 Was to "Send Feingold Packing!"

30. WRTL considered the 2004 Senate election a "key federal race." Exh. 4, Armacost Dep. at 100-01.

31. Defeating Senator Feingold was one of WRTL's top two election priorities in 2004. Facts 32, 38, *infra*.

32. Wisconsin Right to Life itself—not its PAC—issued a press release on March 26, 2004 emphasizing its "resolve to do everything possible to win Wisconsin for President Bush and to send Russ Feingold packing!" Exh. 21. The heading of the press release labeled these the "Top Election Priorities for Right to Life Movement in Wisconsin." *Id.*

33. WRTL through its PAC endorsed Feingold's three prominent opponents: Welch, Michels, and Darrow. Exh. 1, Franklin Rep. at 5-6. WRTL cited each candidate's opposition to judicial filibusters as a reason for its endorsement in each of its endorsement letters for the candidates. Exh. 72, Letters from Bonnie Pfaff, WRTL PAC, to Darrow, Welch, and Michels.

34. In a July 15, 2004 "E-Update" email to its supporters, WRTL stated that when voting on Bush judicial nominees, "Feingold has voted to filibuster those nominees 16 out of 16 times!" WRTL noted that its PAC would "vigorously support whichever of the 3" prominent Republican candidates wins the primary, in part because all three had "pledged to allow an up or down vote on the President's judicial nominees." WRTL noted several other positions of its three endorsed candidates and concluded that **"Russ Feingold has the opposite position on all of those issues!"** Exh. 70, WRTL, E-Update, July 15, 2004 at WRTL-S2-185-86.

35. In a press release, WRTL's PAC Chair, Bonnie Pfaff, "stressed the importance of defeating radically pro-abortion Russ Feingold in the U.S. Senate race," and stated that "[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees." Exh. 22; Exh. 71, Plaintiff WRTL's Response to Defendants' Requests for Admissions Pursuant to the Court's Order, Response No. 22. The release also stated that all three endorsed candidates had stated that they "would oppose a filibuster of a judicial nominee" with a positive or neutral Judiciary Committee recommendation. Exh. 22. Pfaff urged that "the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections." Exh. 1, Franklin Rep. at 6; Exh. 71, Plaintiff WRTL's Response to Defendants' Requests for Admissions Pursuant to the Court's Order, Response No. 22.

36. WRTL's cover story on its spring 2004 edition of its quarterly magazine was "RADICALLY PRO-ABORTION FEINGOLD MUST GO!" WRTL discussed the filibuster of judicial nominees in the article, pointed out that "Feingold has been active in his opposition to Bush's judicial nominees," noted that all three WRTL-endorsed opponents of Feingold "would oppose a filibuster of a judicial nominee if that nominee receives a favorable or neutral recommendation from the Senate Judiciary Committee," and concluded that "FEINGOLD MUST GO!" The article indicated that it was paid for by WRTL's PAC. Exh. 73, *Life Without Limits*, Spring 2004 at 1-2.

37. The cover story of WRTL's Summer 2004 magazine was "Nothing More Important: Re-Electing Pro-Life President Bush and Defeating Pro-Abortion Russ

Feingold." The article indicated that the "top election priorities" for WRTL's PAC were to elect President Bush and "defeat radically pro-abortion U.S. Senator Russ Feingold." WRTL wrote:

> One of Wisconsin's current U.S. Senators, pro-abortion Russ Feingold, faces re-election in the 2004 elections. Feingold has done everything he can to thwart a number of the President's federal judicial nominees at lower court levels and this is only a preview of what Feingold and others would do to defeat President Bush's nominees to the U.S. Supreme Court. The right-to-life community in Wisconsin must do all it can to defeat Feingold and replace him with an individual who will consider President Bush's judicial nominees in a fair manner.

WRTL profiled the three Republican candidates for whom WRTL PAC was "prepared to do all it can to assist the election of that candidate," and noted that all three candidates pledged not to filibuster judicial nominees with favorable or split votes from the Senate Judiciary Committee. Exh. 74, WRTL, *Life Without Limits*, Summer 2004 at 1-2.

38. In a prominent article in the fall 2004 edition of WRTL's magazine, "A Strong Finish in 2004: Bush Wins, Feingold Loses," Barbara Lyons, WRTL's executive director, wrote that the organization's "greatest challenge for 2004" was "to finish strongly in the elections," by winding "up in the win column for President Bush and to retire Senator Feingold." Exh. 24, WRTL, *Life Without Limits*, Fall 2004 at 3. She urged readers "to vote November 2 for President Bush and Tim Michels." *Id.* That particular page of WRTL's magazine was paid for by WRTL's federal PAC. *Id. See also*

Exh. 75 (WRTL PAC thank you letter noting that "[r]eturning George Bush to the Presidency and replacing Senator Russ Feingold with a pro-life U.S. Senator are our primary goals for the 2004 election")

39. An article in WRTL's fall 2004 magazine featured comments from the federal legislative director for National Right to Life discussing the importance of "a single senator [being] defeated in a race in which political observers saw credible evidence that the obstruction of judicial nominees played a significant role in the senator's defeat." Exh. 24, WRTL, *Life Without Limits*, Fall 2004, at 5.

40. Judicial filibusters were one of the five issues highlighted in the voter guide WRTL distributed on the Senate race, a copy of which was included in WRTL's magazine. Exh. 24, WRTL, *Life Without Limits*, Fall 2004, at 15. The voter guide asserted that Michels "has pledged to allow the Senate to vote on President Bush's judicial nominees" whereas Feingold "has voted approximately 20 times since March 2003 to prevent a vote on President Bush's judicial nominees." *Id.* WRTL distributed thousands of the voter guides, including to the approximately 35,000 recipients of its magazine. Exh. 3, WRTL Dep. (Lyons) at 104, 107-10.

41. Through its PAC, WRTL also paid for radio advertising in August or September of 2004 calling explicitly for Feingold's defeat. Exh. 3, WRTL Dep. (Lyons) at 128-31; Exh. 4, Armacost Dep. at 126-27; Exh. 71, Plaintiff WRTL's Response to Defendants' Requests for Admissions Pursuant to the Court's Order, Response No. 15.

42. At the same time that WRTL and its PAC were identifying Feingold's participation in judicial filibusters

as a reason to defeat him in the election, WRTL was sending out a flurry of "e-alerts" and press releases decrying the role of Senators Kohl and Feingold in the filibusters and urging recipients to tell them to stop the filibusters. Exhs. 25-28.

43. In the 2004 Senate race the judicial nomination issue "was raised early and often as a partisan issue with the Republican candidates and Wisconsin Right to Life citing it as a reason to defeat Sen. Feingold." Exh. 1, Franklin Rep. at 9; Facts 30-39, *supra.*

IV. The Origin of the Specific Advertisements at Issue in This Case

44. In the spring of 2004, WRTL began a campaign on the issue of judicial filibusters using its usual means of communications: mass emails and press releases. Exh. 4, Armacost Dep. at 104-05.

45. The idea to start the campaign originated with Susan Armacost, the Legislative/PAC director who is in charge of WRTL's grassroots lobbying; Mary Klaver, another employee in the Legislative/PAC Department; and Barbara Lyons, WRTL's executive director. Exh. 4, Armacost Dep. at 104-05; Exh. 23 (Armacost Dep. Exh. 1), PAC/Legislative Director job description, Dec. 15, 2005 (one of Armacost's job responsibilities is to "[s]upervise the development and maintenance of a grassroots structure for political activity").

46. The broadcast advertising campaign that led to this lawsuit was "distinct from the other activities of e-mailing [WRTL's] supporters" and was a "whole different matter." Exh. 4, Armacost Dep. at 105.

47. WRTL's designated deponent under Rule 30(b)(6) was unable to state who originated the idea of broadcasting the ads at issue in this case and refused to answer whether the idea had originated with counsel. Exh. 3, WRTL Dep. (Lyons) at 22-24.

48. In another case that has been filed, *Christian Civic League of Maine, Inc.* v. *FEC*, Civ. No. 06-614 (D.D.C. filed Apr. 3, 2006), counsel for WRTL solicited prospective clients to file an additional lawsuit in an effort to get a more expedited ruling than in this case and "potentially clear the way for everyone to do such grass roots lobbying." Exh. 29, Email from John Paulton (Focus on the Family) to Michael Heath (Christian Civic League), *et al.* (March 24, 2006) (enclosing message from counsel for WRTL).

49. Ms. Armacost, who has been involved in all of WRTL's other grass roots lobbying campaigns in her 19 years there, did not develop the idea to run the broadcast ads, "had no role in getting it started," and had "nothing to do with the planning of it or the execution of it." Exh. 4, Armacost Dep. at 5-6, 105-10, 113, 115.

50. Barbara Lyons began conversations with an advertising agency about executing a broadcast media campaign on the filibuster issue in early- to mid-May. The talks led to the advertising agency doing research and then sending a detailed written proposal to WRTL on June 9. Exh. 5, Vanderground Dep. at 86-89.

51. Democratic filibusters of judicial nominees had occurred since the spring of 2003 but WRTL had not run any broadcast advertisements on the issue before Lyons initiated talks with an advertising agency. Exh. 3, WRTL Dep. (Lyons) at 82.

52. In her earliest contacts with the advertising agency about a broadcast media campaign on the filibuster issue, Barbara Lyons indicated that WRTL intended to run advertisements during "a certain time when the ads couldn't run" and that the planned advertisements would lead to a lawsuit. Exh. 5, Vanderground Dep. at 41-43.

53. As early as June 8, 2004, the day before the advertising agency presented a written proposal to handle WRTL's campaign that would challenge the law, someone at the agency was researching the likely discovery battles that would occur in litigation and printed out an article about the discovery that occurred during the *McConnell* litigation. Exh. 30, CFIF.org, Following the Bouncing (and Deflating) Ball in the Discovery Phase of Campaign Finance Litigation, HM-01-111, HM-01-113 (printed on June 8, 2004 at 2:19 p.m.).

54. Jason Vanderground, the consultant at the advertising agency who coordinated the ads, researched the "legal parameters," including how many households the broadcast advertising had to reach in order to be subject to the statute's restrictions. Exh. 5, Vanderground Dep. at 46-50.

55. On a number of occasions, WRTL's vendors were under the impression that the focus of their activities was as much on challenging the Bipartisan Campaign Reform Act ("BCRA") as on conducting a campaign on the judicial filibuster issue. *See* Facts 56-57, *infra*.

56. According to WRTL's website vendor's contract, it was asked to design a website "to promote greater public awareness and involvement in challenging campaign finance reform measures and opposing congressional filibusters." Exh. 49 (Vanderground Dep. Exh. 5),

Estimate Hanon McKendry Wisconsin Right to Life Website Design and Development, July 7, 2004.

57. A public relations firm's initial draft of its contract with WRTL listed the objective of the project as "[t]o raise awareness among the general voting public regarding the violation of the First Amendment Right to Freedom of Speech as a result of judicial filibustering." Exh. 50 (Vanderground Dep. Exh. 6), Public Relations, HM-01-294. The final contract, dated July 9, 2004, described the overall objective as to "[r]aise awareness among the general public regarding the filibustering of the President's judicial nominees, as well as the restrictions placed on citizen groups by the Bipartisan Campaign Reform Act. Exh. 77, Straightline, Wisconsin Right to Life Public Relations Proposal. *See also* Exh. 76, "Filibuster/BiPartisan [sic] Campaign Reform Act—Action Plan" (listing "Key Messages" of the Action Plan).

58. In its magazine, WRTL has referred to its advertisements as being "commercials on McCain-Feingold challenge" rather than as on the judicial filibuster issue. Exh. 42, WRTL, *Accomplishments: 2004*, Life Without Limits, Winter 2005, at 7, http://www.wrtl.org/Winter05LifeWithoutLimits.pdf.

59. In crafting the advertisements to form the basis of this test case and the accompanying publicity campaign, WRTL sought to ensure that the ads did not contain too much overt "negativity" and had a "tone" that was very "reasonable" and "respectful." Facts 60-62, *infra*; Exh. 5, Vanderground Dep. at 134-35.

60. The sign-off on the ads was changed from "Tell Feingold and Kohl to stop filibustering and start playing fair" to its final incarnation of "Contact Senators

Feingold and Kohl and tell them to oppose the filibuster." *Compare* Am. Ver. Complt. Exhs. A-C *with* Exh. 52 (Vandergrund Dep. Exh. 15), Waiting, HM-01-411.

61. Handwritten notes from the files of the advertising consultant contain "No negativity about Kohl + Feingold" immediately following notes about campaign finance law. Exh. 33, handwritten notes, HM-01-58-59 at 58.

62. Lyons removed language from one draft press release that characterized the advertising campaign as "denouncing the actions of Democratic Senators Russell Feingold and Herbert Kohl," explaining to the public relations consultant that "This is a no-no." Exh. 33, Fax from Barbara Lyons to Peggy Howard, July 26, HM 01-45-50 at 48.

63. Part of WRTL's motivation in creating its judicial filibuster advertisements was to create a vehicle for a test case that would challenge BCRA's electioneering communications provision. Facts 44-62, *supra*.

V. WRTL Planned to Time its Advertisements To the Election, Not To Any Filibuster Votes

64. WRTL decided early in its campaign that it would run radio and television advertisements close to Senator Feingold's election, with little regard to when actual judicial filibuster votes (motions to invoke cloture) would occur. Facts 65-73, *infra*.

65. In early- to mid-May, WRTL had already decided that it would ask for court permission to run its filibuster advertisements during the electioneering communications period, between August 15 and Senator Feingold's election in November. Facts 50, 52, *supra*.

66. In the beginning of June, WRTL had already determined that its anti-filibuster campaign would launch around August 1, 2004. Exh. 31, Wisconsin Right to Life, Weekly Activity for Each Campaign Component, WRTL-02-75-76; Exh. 5, Vanderground Dep. at 86-89.

67. WRTL's radio advertisements began on July 26 and its television advertisement began on August 2. Exh. 3, WRTL Dep. (Lyons) at 65.

68. The advertisements began a few days *after* four judicial filibuster votes had occurred and the Senate had departed for a six-week recess. *See* Exh. 3, WRTL Dep. (Lyons) at 65; Exh. 35, U.S. Senate Roll Call Votes, 108th Congress—2nd Session (2004), at 4, http://www.senate.gov/legislative/LIS/rollcalllists/votemenu1082.htm (motions to invoke cloture on four judicial nominees on July 20 and July 22); Days in Session Calendars, http://thomas.loc.gov/home/ds/s1082. html (Senate recessed on July 22 and returned on September 7); Exh. 2, Bailey Decl. ¶ 23.

69. In general, both WRTL's employee in charge of grass roots lobbying and its advertising agency lead consultant believe that it is important to run grass roots lobbying advertisements shortly before legislative votes are to occur. Exh. 4, Armacost Dep. at 112 (running ads after votes would be "a waste of time"); Exh. 5, Vanderground Dep. at 30-31.

70. Both WRTL's employee in charge of grass roots lobbying and its advertising agency lead consultant were allegedly tracking the Senate's schedule because of WRTL's planned anti-filibuster campaign. Exh. 4, Armacost Dep. at 120-21; Exh. 5, Vanderground Dep. at 54-56.

71. The ad agency that WRTL used for this lawsuit's advertisements is generally able, when necessary, to create and air radio advertisements in a week and television advertisements in two weeks. Exh. 5, Vanderground Dep. at 24-25. WRTL made no effort, however, to air its advertisements in advance of the judicial filibuster votes that occurred. Exh. 5, Vanderground Dep. at 54-56, 62-63. *See also* Exh. 5, Vanderground Dep. at 86-92.

72. WRTL stuck to the schedule it had planned for months, which was to air the advertisements at a time that was close to the election and would lay the groundwork for a lawsuit, and did not air the advertisements before the filibuster votes that occurred. Facts 64-71, *supra*; Facts 92-93, *infra*.

73. During this litigation, WRTL has repeatedly claimed that it relied on a July 21 news story in setting the schedule for its advertising even though WRTL had essentially determined its schedule more than a month and a half earlier. *Compare* Am. Ver. Complt. ¶ 3; WRTL Mem. in Support of Prelim. Inj. Mot. at 5 [Docket #4]; WRTL Summary Judgment Mot. at 4 & Stmt. of Undisputed Facts, Facts 18-19; *with* Exh. 31, WRTL-02-74-76 (advertising schedule from early June); Exh. 5, Vanderground Dep. at 54-63. *See also* Exh. 98, Filibuster Project Notes, Meeting, July 9, 2004 (final start dates picked by July 9).

74. There were no judicial filibuster votes when the Senate returned following its six-week recess or during the rest of 2004. *See* Exh. 35, U.S. Senate Roll Call Votes, 108th Congress—2nd Session (2004), http://www.senate.gov/legislative/LIS/rollcalllists/votemmenu1082.htm.

75. The scheduling of the judicial filibuster votes that occurred before the recess was largely for the particular purpose of mobilizing voters in the election. Facts 76-79, *infra*.

76. "[C]andidates or their allies [can] easily schedule an issue for 'legislative consideration' during the run-up to an election as a pretext for broadcasting . . . electoral advocacy advertisement[s]." *Christian Civic League of Maine, Inc.* v. *FEC*, 433 F. Supp. 2d 81, 89 (D.D.C. 2006).

77. The judicial filibuster votes were scheduled in order to mobilize conservative voters in the fall election. As one wire story explained, "Republican aides said the move is intended . . . to rally conservative voters in this election season." Exh. 38, UPI, *Senate Dems Block More Bush Judges*, July 22, 2004.

78. On the day that some of the judicial filibuster votes occurred, it was reported that Senator John Cornryn "said the GOP will make judicial nominations an issue in the election." Exh. 39, Dee-Ann Durbin, *U.S. Senate Democrats Block Votes on Michigan Judges*, July 22, 2004, AP Alert.

79. According to an article in the *Washington Times*, "Republicans vowed to make Democratic obstruction of judicial nominees an issue in the November elections," and Senate Majority Leader Bill Frist "made that point clear ... by scheduling a vote" on a judicial nominee. Exh. 40, Charles Hurt, *Democrats Block 6th Judge Pick*, Washington Times, July 21, 2004 at A4.

VI. WRTL Did Not Run Any Advertisements on the Judicial Filibuster Issue When the Issue Became Prominent in the Spring of 2005

80. WRTL did not broadcast any anti-filibuster advertisements in the spring of 2005, when the judicial filibuster controversy actually reached its peak. Exh. 3, WRTL Dep. (Lyons) at 101-03; Fact 81, *infra*.

81. "It was clear" in the spring of 2005 that the filibuster issue was "coming to a head," and groups then spent more than $8.5 million on advertising on both sides of the issue. Exh. 7, Franklin Dep. at 26-27.

82. WRTL and its agents have offered shifting rationales for why WRTL did not run any advertising when filibuster votes were planned outside the election season. Facts 83-85, *infra*.

83. Counsel for WRTL told the Supreme Court that other issues were higher priorities for WRTL after the election. Exh. 48, Supreme Court Oral Argument Transcript, Jan. 17, 2006, http://supremecourtus.gov/oralarguments/argumenttranscripts/04-1581.pdf at 8-10.

84. WRTL's advertising consultant testified that the issue arose too fast in the spring of 2005 for the group to run advertising, Exh. 5, Vanderground Dep. at 146-48, even though the issue actually "had been discussed at some length for some number of months before that." Exh. 7, Franklin Dep. at 27.

85. WRTL's latest explanation is that it did not run advertising at that time because the primary issue then was whether to change the Senate rules to bar filibustering and it was certain that Wisconsin's Democratic Senators would not support such a change. 2nd Lyons

Aff., Exh. 2 to WRTL's Motion for Summary Judgment, ¶ 9.

86. The advertising that groups other than WRTL ran in the spring of 2005 was on the subject of the filibusters themselves, as well as the proposed Senate rule change. *See, e.g.*, Exh. 62 (scripts of five advertisements that ran in the spring of 2005 on the filibuster of judges, not the proposed Senate rule change).

87. Cloture motions on nominees were expected to be voted on in the spring of 2005 and were in fact voted on. *See* Fact 86, *supra*; Exh. 63, U.S. Senate Roll Call Votes, 109th Congress-1st Session (2005), at 13-14 (cloture motion votes on judicial nominees on May 24 and June 7-8) http://www.senate.gov/legislative/LIS/rollcalllists/votemenu1091.htm.

88. WRTL did send an email to its supporters in March of 2005 asking them to contact Senators Kohl and Feingold about the filibuster votes, but only used broadcast advertising in the period before the election in 2004. *See* FEC Exh. 54 (March 16, 2005 email); Facts 67-68, 74, *supra*.

89. During the Supreme Court oral argument in this matter Justice Ginsburg, Justice Scalia, and Chief Justice Roberts all asked WRTL's counsel questions about WRTL's decision not to run any judicial filibuster ads after the 2004 election. Exh. 48, Supreme Court Oral Argument Transcript, Jan. 17, 2006, http://supremecourtus.gov/oralarguments/argumenttranscripts/04-1581.pdf at 8-10. Wisconsin Right to Life then broadcast a radio ad on the filibuster issue approximately ten days after the Supreme Court oral argument. 2nd Lyons Aff., Exh. 2 to WRTL's Motion for Summary Judgment, Exh. A (radio ad dated Jan. 27, 2006). That

advertisement was the first ad on the judicial filibuster issue that it broadcast since it had ceased running the ads at issue here. Exh. 3, WRTL Dep. (Lyons) at 101-03.

VII. WRTL's Advertisements Were Likely to Have Had an Effect on the Senate Election Had They Run During the Electioneering Communications Period

90. WRTL's radio and television ads at issue in this case ran for a substantial amount of air time before the statutory electioneering communication period began on August 15, 2004. Exh. 1, Franklin Rep. at 35.

91. WRTL's ads show examples of people waiting or being delayed and claim that "a group of Senators" are filibustering, or "blocking qualified nominees from a simple 'yes' or 'no' vote." Am. Ver. Complt. Exhs. A-C. The ads attribute the filibusters to "politics at work," argue that the filibusters have caused "gridlock" and created a "state of emergency" in the courts, and then urge viewers to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." *Id.*

92. WRTL's radio ads ran approximately 1100 times on 21 stations in Milwaukee, Green Bay and LaCrosse-Eau Claire. Exh. 1, Franklin Rep. at 35; Exh. 3, WRTL Dep. (Lyons) at 85; Exh. 41 (WRTL Dep. (Lyons) Exh. 9), Wisc. Right to Life, Radio Media Plan As Placed, 7/23/04.

93. WRTL's television ad ran for two weeks in the same three markets, airing approximately 430 times. Exh. 1, Franklin Rep. at 35; Exh. 3, WRTL Dep. (Lyons) at 86; Exh. 41 (WRTL Dep. (Lyons) Exh. 9), Wisc. Right to Life, Radio Media Plan As Placed, 7/23/04.

94. The markets of Milwaukee, Green Bay, and LaCrosse-Eau Claire reach almost 70% of Wisconsin households. Exh. 41, (WRTL Dep. (Lyons) Exh. 9), Wisc. Right to Life, Radio Media Plan As Placed, 7/23/04 at WRTL-02-55. Based on its number of gross ratings points, WRTL's television ad likely reached more than 85% of the households in those markets and provided an average of more than five exposures to the ad for each household during the two weeks that it ran. Exh. 1, Franklin Rep. at 35. By reaching more than 85% of the households in those three markets, WRTL was able to reach approximately 60% of the households in Wisconsin five times.

95. WRTL spent approximately $70,000 to create the advertisements at issue in this case, about $78,000 to air the radio ads, and about $86,000 to air the television ad. Exh. 3, WRTL Dep. (Lyons) at 33-37, 44-46, 50, 56.

96. According to WRTL's own calculations, its advertisements made approximately 18 million contacts with the public. Exh. 42, WRTL, *Accomplishments: 2004*, Life Without Limits, Winter 2005, at 7, http://www.wrtl.org/Winter05LifeWithoutLimits.pdf.

97. Had WRTL obtained a preliminary injunction, it would have spent some $100,000 to continue running its advertisements within the electioneering communications period. Exh. 10, Lyons Aff. ¶ 12.

98. Not counting production costs, WRTL spent approximately $160,000 to air its radio and TV ads prior to the electioneering communications period, making 18 million contacts with the public and getting its TV ad played in 60% of Wisconsin's homes. Had WRTL spent an additional $100,000 to run the ads inside the electioneering communications period, it would have made mil-

lions of contacts with the public and reached a substantial number of Wisconsin's homes. Facts 91-97, *supra*.

99. WRTL's advertisements would likely have had a significant electoral effect had WRTL run the ads during the electioneering communications period. Facts 100-113, *infra*.

100. The ads imply that Senator Feingold "supports the filibuster, and thinks that 'politics' are more important than saving courts from a 'state of emergency' or allowing qualified candidates to serve in the federal judiciary." Exh. 2, Bailey Decl. ¶ 17.

101. The ads "portray Senator Feingold in a negative light and clearly would influence the outcome of the election for which he was campaigning." Exh. 2, Bailey Decl. ¶ 16.

102. The WRTL ad would have been one of the many messages that created an impression about Senator Feingold in the weeks before the election that would have informed voters' decisions in the upcoming election. Exh. 2, Bailey Decl. ¶¶ 7-8.

103. WRTL's ads are similar to purported "issue ads" that were run shortly before elections pre-BCRA and told the audience to contact candidates about an issue. Those purported "issue ads" almost always had the purpose and effect of influencing elections. Exh. 2, Bailey Decl. ¶¶ 9-14.

104. Exposure to a political issue in the mass media increases the salience of that particular issue, encouraging voters to see the issue as an important political problem. Exh. 1, Franklin Rep. at 24-27. This effect is known as "agenda setting," whereby voters are more likely to see issues prominently discussed in the mass

media as politically important. WRTL's ads, for example, presented the delay in confirmation of judges as a serious political problem. Exh. 1, Franklin Rep. at 24. The electoral significance of agenda setting is that candidates are differently advantaged by different topics. Therefore, an important aspect of election strategy is defining what topics the election is about. Exh. 1, Franklin Rep. at 27.

105. WRTL's ads increased the salience of the judicial filibuster issue and made it more likely that voters would connect the issue to their evaluation of candidates, and to Senator Feingold in particular. Exh. 1, Franklin Rep. at 35-36

106. By calling attention to an issue, even if not clearly identifying a candidate's position, ads can increase the weight voters give that issue in evaluating a candidate. This is called "priming": voters primed for an issue will evaluate candidates increasingly on the basis of the candidates' views on that issue. Exh. 1, Franklin Rep. at 28-29. Ads that mention a candidate in connection with that "primed" issue make it more likely that voters will blame, or attribute responsibility to, that candidate for his or her position on the issue. Exh. 1, Franklin Rep. at 23.

107. In the case of WRTL's ads, blaming Senator Feingold for his position on the filibuster issue would have increased the importance of this issue to voter evaluations of him. Exh. 1, Franklin Rep. at 29.

108. The mass public is generally inconsistent across issue positions, taking liberal positions on some issues, conservative positions on others. Exh. 1, Franklin Rep. at 29. "Constraint" refers to the extent to which voters develop consistent positions across issues and connect

issues to partisan positions. Exh. 1, Franklin Rep. at 29. Political advertising increases constraint. Exh. 1, Franklin Rep. at 31.

109. One effect of increasing the salience of a particular issue can be to increase the "constraint" effect, making voters more consistent in their position on the issue relative to other issues and linking their position on the issue more clearly to party. Exh. 1, Franklin Rep. at 29. Political advertising increases constraint or polarization by causing voters to become more consistent across issues. Exh. 1, Franklin Rep. at 32.

110. Even before WRTL broadcast its ads, the partisan connection between the filibuster issue and Senator Feingold had been forged through WRTL's public statements criticizing Senator Feingold on the issue, press releases of the Republican candidates for Senate, and media reports on the use of the filibuster issue against Senator Feingold. Because of this preexisting connection, WRTL's advertisements would have increased the salience of the filibuster issue, an issue that any potential Republican nominee could have been expected to press further. Exh. 1, Franklin Rep. at 34-35. Thus, WRTL's ads increased constraint on the filibuster issue and increased partisan alignment on the issue. Exh. 1, Franklin Rep. at 35-36.

111. WRTL's ads were likely to act as a mobilizing force for pro-life voters and WRTL's supporters in the state, and any increase in turnout among this segment of voters would have clearly favored the Republican candidate. Exh. 1, Franklin Rep. at 36.

112. WRTL made some effort to target its ads towards an older, more public policy-aware audience with a male skew, a demographic that is more likely to in-

clude people who could be mobilized to vote against Senator Feingold than a less policy-aware audience. Exh. 1, Franklin Rep. at 35-36.

113. Had they been broadcast during the electioneering communication period, WRTL's ads should have been expected to have electoral effects on the campaign, regardless of their purported purpose. Exh. 1, Franklin Rep. at 24.

VIII. WRTL Also Used Other Means of Communication to Get Its Message Out

114. WRTL employed a number of means of communication in addition to its broadcast advertisements in its judicial filibuster campaign. Facts 115-17, *infra*.

115. WRTL sent letters to Senators Kohl and Feingold, issued press releases, published op-eds in newspapers, and sent mass emails to 5,000-6,000 recipients. It sent approximately 100,000 automated phone messages, created a dedicated website, published articles in its magazine, held press conferences, appeared on television and radio programs, had staff quoted in newspapers and magazines, distributed voter guides addressing the issue (including through direct mail), and made telemarketing calls using the issue to raise funds. Exh. 3, WRTL Dep. (Lyons) at 61-63, 89-115; Exh. 4, Armacost Dep. at 111-12; Exh. 36 (WRTL Dep. (Lyons) Exh. 15), Barbara L. Lyons, *Unprecedented Filibusters Are Un-American: Senators Feingold and Kohl Should Oppose Gridlock*, WRTL-02-19—20; Barbara Lyons, *Nominees Deserve a Vote*, Milwaukee Journal Sentinel, Aug. 6, 2004; Exh. 54, WRTL Dep. (Lyons) Exh. 16, WRTL Press Releases and E-Alerts; Exh. 24, WRTL, *Life Without Limits*, Fall 2004, at 3, 5, 7, 15; Exh. 37,

Filibuster Project Notes, July 9, 2004, HM-01-323—24 (decision to place 100,000 IVR or automated calls); Exh. 55, Email from Barbara Lyons, Jul 21, 2004, FM-01-80—81 (100,000 phone calls scheduled to begin August 1).

116. WRTL spent about $260,000 on its 2004 anti-filibuster campaign, using a variety of public and non-public tools; enlisting the services of an advertising agency, a website creator, pollsters, and a publicist; and drawing on a wide variety of non-broadcast media for publicity. Exh. 56, Plaintiff WRTL's Response to Defendants' Requests for Admissions, Request Nos. 56-57.

117. In July 2004, WRTL's main web site, *www.wrtl.org*, was full of the press releases, "e-alerts" and other materials criticizing Senator Feingold on the filibuster issue. This website was linked to the *www.befair.org* site, created for its filibuster campaign, to which the WRTL ads directed viewers and listeners. *See* Exh. 54 (WRTL Dep. (Lyons) Exh. 16), WRTL Press Releases and E-Alerts; Exhs. 57-59.

IX. WRTL Received A Significant Amount of Funding From Business Corporations in 2004, and Appears to Have Significantly Scaled Back Its Efforts to Raise Funds for Its Federal PAC

118. WRTL raised more than $315,000 from corporations for its general fund in 2004, the "vast majority" from business corporations. This amounted to nearly one-fourth of its total revenues that year. Exh. 3, WRTL Dep. (Lyons) at 147-51; Exh. 60 (WRTL Dep. (Lyons) Exh. 23), Corporate Contributions to General Fund 1/1/04 through 12/31/04. WRTL raised approximately $300,000 in corporate contributions in incre-

ments of $1000 or more and approximately $260,000 of those corporate funds were from business corporations rather than non-profit corporations. Exh. 78, Plaintiff WRTL's Responses to Defendants' Interrogatories, Response No. 7 & "Contributions to General Fund" attachment.

119. Business corporations made donations to WRTL in 2004 that were as large as $50,000 and $140,000. Exh. 78, Plaintiff WRTL's Responses to Defendants' Interrogatories, Response No. 7 & "Contributions to General Fund" attachment.

120. Between five and ten business corporations, some from outside Wisconsin, donated a total of more than $50,000—perhaps more than $100,000—specifically to finance the advertisements in this case. Exh. 3, WRTL Dep. (Lyons) at 143-45, 150.

121. WRTL's general fund received eight contributions from individuals that by themselves would have exceeded the $5000 annual limit for each individual's contributions to a multicandidate political committee such as WRTL's PAC. WRTL received contributions from individuals in amounts as large as $25,000, $50,000, and $100,000. Exh. 78, Plaintiff WRTL's Responses to Defendants' Interrogatories, Response No. 7 & "Contributions to General Fund" attachment.

122. Rather than being unable to raise money for its federal PAC in 2004, it appears that WRTL ceased raising money for that account and shifted its fundraising efforts toward its general treasury. *See* Facts 123-31, *infra*.

123. Although WRTL's PAC raised approximately $155,000 in the 1999-2000 election cycle, it received less

than $13,000 in 2001-02, Exh. 10, Lyons Aff. ¶ 7, and less than $17,000 in 2003-04, Exh. 3, WRTL Dep. (Lyons) at 155.

124. Although the yearly limit on individual contributions to a multicandidate political committee such as WRTL's PAC is $5,000, during the 2003-2004 election cycle WRTL's PAC received contributions from no individual that totaled more than $1,000. *See* Exh. 56, Plaintiff WRTL's Response to Defendants' Requests for Admissions, Request No. 13; FEC Disclosure Reports, available at <http://query.nictusa.com/cgi-bin/fecimg/?C00173278> (visited July 5, 2006); Exh. 44.

125. Receipts by PACs in general increased by 13% from the 1999-2000 election cycle to the 2001-02 election cycle. Exh. 45, FEC, *PAC Activity Increases for 2002 Elections*, Mar. 27, 2003, http://www.fec.gov/press/press2003/20030327pac/20030327pac.html.

126. Between the 2001-02 election cycle and the 2003-04 election cycle, the aggregate annual limit on federal contributions that an individual could make were substantially increased by BCRA § 307, and receipts by PACs in general increased by 34%. Exh. 46, FEC, *PAC Activity Increases for 2004 Elections*, Apr. 13, 2005, http://www.fec.gov/press/press2005/20050412pac/PACFinal2004.html.

127. WRTL has yet to raise any money at all for its federal PAC during the current election cycle. *See* Exh. 47, WRTL April 2006 Quarterly Disclosure Report.

128. PAC receipts nationally increased approximately 50% during the period between the 1999-2000 election cycle and the 2003-04 election cycle, Facts 125-26, *supra*, and WRTL has provided no reason why fund-

raising was harder for its PAC than for everyone else, Exh. 3, WRTL Dep. (Lyons) at 154-64.

129. In 2004, WRTL shifted fundraising efforts from its PAC to its corporate treasury for the filibuster campaign. WRTL had planned to attempt to raise $58,000 in 2004 for its federal PAC through telemarketing, but the PAC did not follow its 2004 plan after January; in the same year, WRTL raised money from its members through telemarketing for the filibuster ads, but deposited the funds into its general treasury rather than its PAC. Exh. 61 (Armacost Dep. Exh. 5), Federal PAC 2004 Budget; Exh. 3, WRTL Dep. (Lyons) at 112-15, 141; FEC Exh. 67 (filibuster campaign fundraising scripts for calls to "Regular Donor[s]" for "General Fund"); Exh. 68 at p. 7 (WRTL's 2004 plan for fundraising appeals not followed after January).

130. WRTL made no special effort in 2004 to raise additional PAC funds or recruit new members. Exh. 3, WRTL Dep. (Lyons) at 153-54, 161-62.

131. The only special effort WRTL made in 2004 to raise funds was to hire an outside fundraiser to solicit funds from a relatively small number of donors to help pay for the ads at issue in this case through its general treasury. Exh. 3, WRTL Dep. (Lyons) at 140-45.

132. WRTL also raised funds for its 2004 filibuster campaign through telemarketing. Exh. 3, WRTL Dep. (Lyons) at 112-15 & Exh. 17.

133. Had WRTL simply raised for its PAC the same amount of money in 2004 that it did in 2000, it would have had more than enough to pay for the additional $100,000 that it intended to spend on the ads that are at

issue here and for a portion of the production costs for the advertisements. Exh. 10, Lyons Aff. ¶ 12.

134. In the 2003-2004 election cycle, WRTL received thirty-five contributions from individuals of $1,000 or more for its general fund. Exh. 78, Plaintiff WRTL's Responses to Defendants' Interrogatories, Response No. 7 & "Contributions to General Fund" attachment.

135. WRTL never considered the possibility of funding its 2004 electioneering communications through its PAC. Exh. 3, WRTL Dep. (Lyons) at 157.

136. In 2004, WRTL did not spend most of the $14,000 it had in its PAC at the time it sought a preliminary injunction in this case, and it has no explanation for why it did not. Exh. 3, WRTL Dep. (Lyons) at 157.

137. WRTL and its local chapters have communicated with the public in the past using means that it did not employ to publicize its anti-filibuster campaign, including running advertisements in the print media, distribution of brochures, and purchasing billboards. Exh. 3, WRTL Dep. (Lyons) at 96-97, 106-07, 115.

138. The only written documentation that WRTL produced in support of its contention that non-broadcast communications would not be as effective as broadcast in disseminating WRTL's grassroots lobbying messages was a fax from its current advertising agency that was faxed to it a few days before its discovery response was due in 2006. It did not have the document in its possession at the time it planned to run its 2004 advertisements. Exh. 3, WRTL Dep. (Lyons) at 118-19.

139. When WRTL was not successful in getting a preliminary injunction permitting it to run additional broadcast advertising for its judicial filibuster campaign,

it did not even consider putting additional resources into non-broadcast methods of getting its message out. Exh. 5, Vanderground Dep. at 127.

X. Many Legislation-Focused Ads Do Not Clearly Identify Particular Members of Congress But WRTL Never Considered Running Such an Ad on the Filibuster Issue

140. Many legislation-focused ads, such as those broadcast by Citizens for Better Medicare, simply ask viewers to contact Congress or take similar action. *See McConnell* v. *FEC*, 251 F.Supp.2d 176, 545-47 (D.D.C. 2003) (Kollar-Kotelly, J.).

141. In the context of judicial filibuster ads, groups have broadcast advertisements outside of the electioneering communications window that did not clearly identify the Senators whom viewers were being urged to lobby. Facts 142-44, *infra*.

142. In 2005, a group financed an advertisement discouraging a filibuster of John Roberts which did not clearly identify any individual Senators and contained the sign-off "Urge the Senate to give John Roberts a fair up-or-down vote." Exh. 64, "Brilliant" script.

143. In 2005, a group financed an advertisement discouraging a filibuster of Harriet Miers which did not clearly identify any individual Senators and contained the sign-off "Like past nominees, Harriet Miers deserves a fair up-or-down vote in the U.S. Senate." Exh. 64, "Trailblazer" script.

144. In 2005, a group paid to run an advertisement against the filibuster of Samuel Alito which did not clearly identify any individual Senators and contained

the sign-off "Urge the Senate to give Samuel Alito a fair up or down vote." Exh. 64, "Alito" script.

XI. WRTL Spent Almost $60,000 to Run a Radio Advertisement That Did Not Name Any Federal Officeholders During the Electioneering Communication Period as Part of the "Campaign Finance" Phase of Its Purported Grassroots Lobbying Campaign

145. From the outset, WRTL's multi-faceted campaign included a contingency plan, should WRTL be unsuccessful in gaining a preliminary injunction to run its filibuster advertisements, for broadcast advertisements attacking the McCain-Feingold law without naming any officeholders. Facts 146-51, *infra*.

146. In early June, WRTL had already developed a detailed calendar for rolling out different phases of its advertising. WRTL planned its weekly activity for every week from June 13 through the end of August on both the "Anti-Judicial Nominee Filibuster" campaign component and the "Campaign Finance" component. The judicial filibuster component was scheduled to go public on August 1 while the campaign finance component was scheduled to go public on August 15. The campaign finance component included TV or radio ads that were scheduled to be shot the week of August 1 through 7. Exh. 79, WRTL, "Weekly Activity for Each Campaign Component."

147. If WRTL were unsuccessful in securing a preliminary injunction, it planned to broadcast TV and radio ads that were critical of the electioneering communication provision of BCRA but that did not name any federal officeholders. Exh. 80, "Key Legal Dates & Scenarios" (in the event of an unfavorable ruling, plan was to

"[b]egin airing ad that ties filibustering and campaign finance reform together (combo) without identifying Senator Feingold (generic)"; Exh. 81, "Wisconsin Right to Life Action Plan/Timeline" (plan after unfavorable decision was to "[a]ir generic ad"); Exh. 82, Filibuster Project Notes, Meeting, July 9, 2004 ("Create a generic ad mentioning both issues to air when the blackout period is in effect and the court is deciding or we have lost in court.").

148. WRTL had its advertising agency draft a number of TV and radio ads for the second phase of WRTL's 2004 campaign (the "campaign finance" phase) and a number of the drafts did not contain any reference to federal officeholders. *See* Exhs. 83-86 (draft ads); Exh. 87, Working Budget, July 13, 2004 (budget for "two :30 campaign finance reform TV spots" and "two :60 campaign finance reform radio spots"); Exh. 88, Hanon McKendry Job Summaries (over fifty hours spent by advertising agency for "Phase 2" TV and radio spot production). Those ads urged action on federal campaign finance reforms without mentioning any federal officeholders and directed viewers to WRTL's filibuster/BCRA web site. *See, e.g.*, Exh. 84 at HM-S2-088, "Reform Patrol" (Version B), ("More restrictions on free speech. Less information. Was that the intent of campaign finance reform? If this doesn't sound right to you, let's get Washington to fix the problems they created with campaign finance reform... Visit BeFair.org."). *See also* Exh. 89, "Technical Difficulties" (Version C), Aug. 10, 2004 (alternative draft).

149. WRTL ultimately chose to air one radio advertisement during the second phase of its campaign. The ad was called "Technical Difficulties" while being

drafted and was later called "News Bulletin." It criticized recent "campaign finance reform" without naming any federal candidates and encouraged listeners to visit the website that WRTL set up for its judicial filibuster/BCRA challenge campaign. Exh. 90, WRTL, "Wisconsin Right to Life Files Appeal Today in U.S. Court of Appeals, District of Columbia to Protect Integrity of Grassroots Lobbying," Aug. 17, 2004 at FM S045; Exh. 32, Aug. 16, 2004, WRTL Email, WRTL-02-39—40. WRTL spent a little more than $7,000 to produce different versions of "News Bulletin" and paid approximately $50,000 to air the ad during the electioneering communications period in 2004. Exh. 90 Invoice, Aug. 1, 2004; Exh. 92, "Radio Media Plan As Placed, 8/16/04—8/22/04"; Exh. 93, "WRTL Radio Media Plan As Placed, 8/23 / 9/12/2004"; Exh. 94 (radio station invoices).

150. WRTL's "news bulletin" ad directed viewers to its filibuster/BCRA challenge web site ("BeFair.org"). Exh. 90, WRTL, "Wisconsin Right to Life Files Appeal Today in U.S. Court of Appeals, District of Columbia to Protect Integrity of Grassroots Lobbying," Aug. 17, 2004 at FM S045; Exh. 32, Aug. 16, 2004, WRTL Email, WRTL-02-39—40. At that site, WRTL urged Wisconsin residents to contact their Senators in order to "ask them to permanently fix the problems with campaign finance reform that they helped to create" and ask them to support a specific bill then-pending in Congress, the "First Amendment Restoration Act." Exh. 95, WRTL, "Ask Your Senators to Fix the Problem."

151. WRTL's contingency plan if it obtained a preliminary injunction from this Court was not only to run the anti-filibuster ads after August 14 but also to seek

this Court's permission to run advertisements on the campaign finance issue referring only to Senator Feingold and not to Senator Kohl. FEC Exh. 76; Exh. 96 "Key Legal Dates & Scenarios," (in the event of a favorable ruling plan was to "[r]equest permission from U.S. District Court to air campaign finance reform spots that call on Senator Feingold to remedy the situation"); Exh. 97, "Revised On-air Schedule"; Exh. 98, Filibuster Project Notes, Meeting, July 9, 2004 ("Create another filibuster ad which asks Feingold to sponsor legislation to allow lobbying ads in an election cycle to test if we win in court with the first ads."); Exh. 99, "Wisconsin Right to Life Action Plan/Timeline" (plan after favorable decision was to "[s]eek approval for second flight of ads").

152. In preparation for the contingency of a favorable decision from this Court on the filibuster advertisements, WRTL's advertising agency prepared a script for a television advertisement that criticized campaign finance reform and concluded "More restrictions on free speech. Less information. Was that the intent of campaign finance reform? If this doesn't sound right to you, ask Senator Fiengold [sic] to fix the problems with campaign finance reform that he helped to create... Visit BeFair.org." Exh. 100, "Reform Patrol" (Version C), Aug. 3, 2004. The advertising agency also prepared draft scripts that mentioned Senator Kohl as well as Senator Feingold. *See* Exh. 101, "Technical Difficulties" (Version B), Aug. 9, 2004.

153. In the polling that it conducted in advance of its advertising campaigns, WRTL specifically tested several questions that focused solely on Senator Feingold in order to learn the public's "Opinions About Senator

Feingold." In addition to other questions, WRTL tested the following questions:

> "Having heard more information about this one part of the new campaign finance reform law, do you believe it was the intention of Senator Russ Feingold to prevent citizens from being able to lobby their own Member of Congress on important upcoming votes in Congress during the election campaign?
>
> And, do you believe Senator Russ Feingold SHOULD or SHOULD NOT sponsor a bill in the Senate to allow citizen groups to express their views to Members of Congress on important upcoming votes in Congress regardless of when those votes are occurring?

Exh. 102, Wisconsin Statewide Benchmark Study, June 29-30, 2004, at WRTL-S2-202; Exh. 103, Robert K. Autry, NMB Research, "What Wisconsin Thinks About Campaign Finance Reform and the Filibustering of Judicial Nominees," July 9, 2004, Slides 57-62.

Respectfully submitted,

/s/ KEVIN DEELEY
LAWRENCE H. NORTON
General Counsel

RICHARD B. BADER
Associate General Counsel

DAVID KOLKER
Assistant General Counsel

HARRY J. SUMMERS
KEVIN DEELEY
STEVE N. HAJJAR
FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650
(202) 219-0260 (FAX)

September 1, 2006

[FEC Exhibit 2]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04CV01260 (DBS)(RWR)(RJL)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF
v.
FEDERAL ELECTION COMMISSION, DEFENDANT
AND
SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

[Filed: July 14, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 2 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04CV01260 (DBS)(RWR)(RJL)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF
v.
FEDERAL ELECTION COMMISSION, DEFENDANT
AND
SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

DECLARATION OF DOUGLAS L. BAILEY

1. My name is Douglas L. Bailey. In 1968, I founded Bailey, Deardourff & Associates, which was among the first national political consulting firms working for Republican candidates for Governor, Congress, Senate, and President. Our clients included Gerald Ford's Presidential Campaign, and over fifty successful campaigns for Governor or the United States Senate in 17 states. We also did political ads for political parties and issue groups. A copy of my curriculum vitae is attached to this declaration.

2. As campaign consultant, my job was to plan the campaign and then create broadcast advertisements that would shape its outcome. In 2000, John Deardourff and I were each among the first eight recipients of the American University-Campaign Management Institute's "Outstanding Contribution to Campaign Consulting" Award given to the consultants who have best represented the ideals of the profession and shown concern

for the consequences of campaigns on public attitudes about our democratic process.

3. I also have extensive experience consulting on various citizens' initiatives and other grass roots issue campaigns. For example, I have advised among others Handgun Control, Inc., Floridians Against Casinos, and League of Conservation Voters.

4. In 1987 I co-founded The Hotline, a bipartisan daily briefing that covers the media coverage of campaigns, candidates, and specific political issues raised in over 2,500 media sources nationally, including television, radio, and newspapers across the country. Its audience includes the White House, Congress, both political parties, the political consultancy industry, numerous special interest groups, and a wide variety of national media outlets. The Hotline was sold to the National Journal in 1996. I have continued as a Senior Advisor at The Hotline to this day.

5. From 2001 through the 2004 election, I was the president of Freedom's Answer, a non-partisan voter turnout program co-founded with Mike McCurry, former Press Secretary to President Clinton. Our purpose in founding Freedom's Answer was to counteract declining voter turnout, particularly among young people. In 2002, the program helped create the largest voter turnout ever in a non-presidential year (both nationally and in 27 different states). In 2004, it contributed to an astounding increase of 17 million voters above the 2000 presidential turnout.

6. I have not served as an expert witness in the last four years, although I submitted a fact witness declaration in *McConnen* v. *FEC*. I am receiving no compensa-

tion for this declaration. A list of my publications for the last 10 years is attached.

7. The quintessential purpose of a political consultant's role in designing an advertising campaign for a specific candidate is to create a cumulative, positive general impression of the candidate and provide a favorable context in which the voters can make a decision about that candidate. In contrast to commercial transactions for which advertising is run, nearly all political "sales" take place on a single day—election day. The context for voters' decisions is created by what happens leading up to election day. Aggressive political campaigns always seek to create the most favorable context in which voters are asked to make their decisions, based on the goals of the group sponsoring the advertisement. Broadcast advertisements about candidates are short in duration and the image sought cannot be achieved in only one or two ads. However, over time, a campaign consultant will attempt to define a candidate through a combination of style, image, and issues. Each advertisement that airs in support of a candidate in the months leading up to an election is intended to give voters a "feel" for the candidate.

8. Arguably the most important voters -- the "swing" voters that will ultimately decide the outcome of the election-rarely vote for a candidate based solely or even significantly on substantive positions that the candidate has on the issues. Rather, these voters will support a candidate if they perceive that the candidate is likeable and shares similar values to them. A campaign consultant will often use a substantive issue simply as a vehicle to help persuade targeted voters that the candidate shares their values, and to make the voters comfortable

with the candidate. Even shortly after watching an ad, the target audience usually doesn't remember the ad's substantive details. Rather, the viewers just get a feel for the candidate. It takes a lot of these "feels" to make up a campaign. So-called issue ads that mention a candidate by name, whether in a positive or negative context, will undoubtedly influence the election because such ads are merely another method of providing voters with a feel for the candidate.

9. Prior to BCRA, so-called issue ads financed by soft money were an integral part of candidate election campaigns, and they were often part of a concerted joint effort and overall plan between advocacy groups and the candidate to elect the candidate. Competent political consultants know that true issue ads run in the time period immediately preceding the election are largely ineffective at actually raising voter awareness of, or interest in, a particular issue. In the time period preceding the election, true issue ads are likely to be drowned out and overwhelmed by the large volume of various political ads seeking to influence the election. Issue ads run during this time that go out of their way to mention a candidate's name inexorably intertwine with the campaign election message itself, augmenting voters' overall perception of candidates by providing additional context in which to view the candidate.

10. A true issue ad campaign is most effective when it is aired outside of the time period immediately before an election, when its message—even if the message refers to an officeholder—will not be received as another variety of candidate campaign ad. By contrast, an ad run shortly before an election that specifically mentions a candidate's name—even one purportedly about an

issue—almost always is designed to and always has the effect of being part of a campaign package to subtly influence a voter to reach certain conclusions about the candidate while giving the voter the impression he came to that conclusion entirely independent of political propaganda.

11. A purported issue ad that airs in the time immediately preceding an election that implores a voter to "contact"or "tell" a candidate about one's opposition to a certain policy will unavoidably affect that candidate's election. During the election time period, the implicit message to the voter is that one way to change the policy would be to remove that candidate from office on election day. Conversely, an issue ad which airs during the pre-election period and implores a voter to contact or tell a candidate about one's support for a particular policy, implicitly suggests that one way to continue that policy is to vote for the reference candidate.

12. Context and timing will ordinarily determine whether an ad is a true issue ad or an electioneering ad in disguise. While an ad that refers to a candidate may have an effect as an issue ad a year away from an election, that same ad will impact the viewer as an electioneering ad when it is aired right before an election. In the midst of swirling campaign activity, the primary impact of an ad that mentions a candidate's name will be as an electioneering ad. In short, the audience is simply unlikely to distinguish between the issue in the ad as opposed to the more prevalent election activity when the so-called issue ad mentions a specific candidate's name.

13. There is no practical difference, in the context of an election, between asking the audience to "contact" a Congressman or Senator regarding a "negative" issue

about which his position is widely known, or to "vote against" him, at least in part because of it. I believe that it is actually more effective in many cases to use indirect words such a "contact" instead of direct appeals such as "vote for" or "vote against" because often voters will respond more favorably to a political message employing subtlety.

14. The context and environment in which an ad airs is an important consideration in designing the ad and how the ad will be perceived by the viewer. Competent interest and advocacy groups are fully cognizant of this dynamic and would only run a so-called issue ad or grassroots lobbying ad in the run-up to an election with full knowledge that it is the functional equivalent of electioneering. Before BCRA, advocacy and interest groups aired many more purported issue ads in the time period immediately preceding an election, and those ostensible issue ads were much more likely to mention a candidate by name. As any experienced campaign consultant knows, ads that mention a candidate by name in the time period immediately preceding an election are likely intended to influence, and unavoidably will influence, that election.

15. Issue organizations can design true issue ads without ever mentioning specific candidates for federal office. When we were creating true issue ads at Bailey, Deardourff (*e.g.*, for ballot initiatives or more general issues such as handgun control), and when we were creating true party building ads, it was never necessary for us to reference specific candidates for federal office in order to create effective issue ads.

16. Based on my experience in campaigns, I believe WRTL's filibuster issue ads undeniably would have in-

fluenced the election had they been aired at the intended time. When viewed in the context of the timeframe they were intended to air, they portray Senator Feingold in a negative light and clearly would influence the outcome of the election for which he was campaigning. The ads disparage a "group of senators" for blocking qualified candidates from serving as judges, and using politics to cause "gridlock and back up some of our courts to a state of emergency." The ads then specifically urge voters to contact Senators Feingold and Kohl and tell them to oppose the filibuster.

17. The logical and unavoidable implication of the ads is that Senator Feingold (the only Senator mentioned who was up for reelection) supports the filibuster, and thinks that "politics" are more important than saving courts from a "state of emergency"or allowing qualified candidates to serve in the federal judiciary. Indeed, there would be no reason to tell voters to contact Feingold and Kohl urging them to oppose the filibuster if they were already opposed to it.

18. The fact that the proposed ads deal with both a candidate (Feingold) and a non-candidate (Kohl) equally and did not single out the candidate is of no practical consequence in terms of the implicit message communicated to voters, *i.e.*, express your displeasure and disregard by complaining to Kohl and by voting against Feingold.

19. In assessing the effect of the three WRTL ads, it is relevant to consider the context of WRTL's explicit advocacy against Senator Feingold. WRTL, Senator Feingold's Republican opponents, and the Wisconsin Republican Party had criticized Feingold for his support of the judicial filibusters and had made it a significant

campaign issue. Specifically, WRTL had released press statements critical of Senators Feingold and Kohl on July 14, and July 21, 2004. In its July 14 press release, WRTL noted that it had "grave concerns" that Senators Feingold and Kohl had "voted 16 out of 16 times to filibuster judicial candidates." The same press release also noted that Miguel Estrada had to withdraw his nomination after two years of having it filibustered. In its July 21 press release, WRTL stated that "the Senate, with the assistance of Senators Kohl and Feingold, has voted to continue its unprecedented filibuster of judicial nominees."

20. Though WRTL criticized Senators Feingold and Kohl for two years of filibusters, and lamented that one "well-qualified" judge had already had to withdraw his nomination, it did not start to run its so-called grassroots lobbying ads until right before the upcoming election. Pre-BCRA, this pre-election period was consistently the time when most "issue ads" financed with soft money were aired in a thinly disguised attempt to influence the election. By WRTL's own admission, the filibuster issue was a longstanding one. If WRTL had truly wanted to run effective issue ads, it would have been best, as every competent campaign consultant knows, to run them long before the election - or even after the election, when the clamor of competing campaign messages would have died down. Instead, WRTL followed the historical pattern of attempting to run so-called issue ads that mention a candidate's name just prior to the election. Advocacy groups adopt this approach primarily to influence the election.

21. WRTL's ads provided no phone number, URL, address, or other contact information allowing listeners

or viewers to actually contact Senators Feingold and Kohl, as WRTL encourages. Instead, the ad directs listeners to WRTL's own website where, it says, contact information for Feingold could be found. But no information necessary to contact Feingold is provided by the ad itself. Indeed, the ad directed viewers and listeners to WRTL's website, which through its e-alerts, was explicitly critical of Senator Feingold's position on filibusters. This too is relevant in my assessment that the ads would have an electoral impact.

22. From a campaign consultant's point of view, WRTL's ads (airing in the heat of an election campaign) telling voters to contact Senators Feingold and Kohl would have been ineffective for the purpose of influencing the filibuster fight in Congress. The ads, however, would undoubtedly have been effective as electioneering ads, implicitly portraying Senator Feingold as "unfair," and providing a negative general context in which voters would view him when they cast their ballots.

23. WRTL's advertising strategy is inconsistent with an advocacy group that wished to engage in "grassroots lobbying." WRTL did not begin to air its advertisements until a few days *after* several judicial filibusters had happened. Any competent consultant who truly wished to engage in "grassroots lobbying" would have run issue ads in the time leading up to the July filibusters, when the message would not have been obfuscated by the abundance of electioneering ads. Nor would any competent campaign consultant run ads after July 22, 2004, when the Senate left for summer recess.

24. WRTL's proposed grassroots lobbying exception would allow political consultants to design ads to influence voter behavior by portraying an issue (and/or poli-

ticians supporting that issue) in a positive or negative light, and then asking the audience to contact the incumbent politician to oppose or support that legislation, initiative or measure. These ostensible issue ads would have a profound and direct impact on candidate elections. There are and always will be hot-button political issues before Congress right before any election that could be used as a pretext for airing supposed issue ads within the immediate pre-election time frame of BCRA.

25. Examine, for example, the pertinent text of WRTL's proposed "Loan" ad, one of the radio ads at issue in this case.

> Sometimes it's just not fair to delay an important decision.
>
> But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates are not getting the chance to serve.
>
> It's politics at work, causing gridlock ad backing up some of our courts to a state of emergency.
>
> Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
>
> Visit: BeFair.org.
>
> Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

26. Under WRTL's proposed exception to BCRA, campaign consultants will be able to easily design grassroots lobbying ads that are much more vitriolic, insidious, and emotive than the ads at issue in this case. While the ads will be grassroots lobbying in name, they will be electioneering ads in reality and effect. Political consultants, advocacy groups, and other parties will develop ads that will render the grassroots lobbying ads/sham issue ads distinction as meaningless as the former issue advocacy/express advocacy distinction.

27. Under WRTL's notion of issue advertising, nothing would stop it from modifying the above ad to read as follows:

> Sometimes it's just not fair to delay an important decision.
>
> But in Washington it's happening. A group of Senators *tied to a radical pro-abortion philosophy* is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates are not getting the chance to serve, because *the Senators do not have a modicum of respect for human life.*
>
> The Senators are putting politics ahead of democracy and fairness, causing gridlock and backing up some of our courts to a state of emergency.
>
> Contact Senators Feingold and Kohl and tell them to make sure that these un-American tactics stop and to vote to end the filibuster.
>
> Visit: BeFair.org.

> Paid for by the Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

The italicized portions of this modified ad quote language in the preceding paragraph is from a WRTL press release characterizing Senator Feingold after he voted against Unborn Victims of Violence Act. R. at 18, Ex.20.

28. Similarly, a pro-choice group such as Planned Parenthood could design an inflammatory and diametrically opposed ad that would fit WRTL's grassroots lobbying exception. For example:

> Right now, the Senate is trying to push through a group of radically right-wing judges to serve on the Federal Courts of Appeal. These judges want to invade your right to decide if and when you will have a family, and insert themselves into women's reproductive choices and control what choices women make affecting their bodies. These judges have made it clear that they will take away a woman's right to choose.
>
> The only thing standing between you and your right to choose is a brave group of Senators who refuse to confirm these judges who will not respect your existing rights.
>
> But the political pressure is mounting. Call Senators Feingold and Kohl and tell them to oppose these radical judicial confirmations.
>
> Paid for by Planned Parenthood of Wisconsin, which is responsible for the content of this adver-

tising and not authorized by an candidate or candidate's committee.

29. These two hypothetical, yet conceivably allowable, ads have a clear political message that will influence the electorate if they are aired immediately before an election (even with the required disclaimer that the ads are not authorized by any candidate). The unavoidable result is that the ads would necessarily become a part of the election campaign, and would serve to persuade voters how to cast their ballots. In reality and effect, grassroots lobbying ads specifically mentioning candidates and aired within the pre-election time period are exactly what pre-BCRA issue ads were, the functional equivalent of electioneering ads.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

/s/ DOUGLAS L. BAILEY
DOUGLAS L. BAILEY

June 2, 2006
Date

Douglas L. Bailey
1200 North Nash Street,
1114
Arlington, VA 22209

Office: 202-266-7150
Home: 703-528-2899
Email: DBailey@njdc.com

Founder (with Mike McCurry), Freedom's Answer (2001-2004)

The non-profit program was designed to be the nation's largest-ever non-partisan voter turnout program, causing high school students to recruit ten voter pledges each from parents, neighbors, friends. In 2002, it helped create the largest voter turnout ever in a non-presidential year (both nationally and in 27 different states); in 2004 it contributed to an astounding increase of 17,000,000 voters above the 2000 presidential turnout. Its goal was to empower students too young to vote what participation can mean.

Founder, Youth-e-Vote, Inc. (Non-profit, non-partisan 501(c)(3))

The first national registration and online voting in American history was an unofficial student vote for President, Senate, Governor and key issues in 2000. 1.3 million students (most too young to vote officially) made it by far the largest online vote ever.

Founder, CEO, Freedom Channel Inc. (2000)

The non-profit FreedomChannel.com was the first-ever experiment with video on demand from House, Senate, Governor, and presidential candidates - allowing users to "dial up" the candidates of their choice on the issues of their choice at the time of

their choice. CA 2000 direct-to-camera videos were provided by the candidates, setting a trend for years to come.

Co-Director of the Rolling Cyber Debate (Fall 2000)

With Mike McCurry and for the Markle Foundation, he negotiated and over saw a daily online interchange between the presidential candidates, carried online by WebWhiteBlue.org and 17 of the largest online traffic centers.

Founder, Publisher, Senior Advisor, *The Hotline* (1987-present)

The Hotline is a bipartisan, daily, online briefing on American politics that "covers the coverage" of politics from TV, radio and 300 dailies. Its audience includes:

The national TV networks	House of Representatives
60 daily newspapers	The U.S. Senate
The consultant industry	The White House
The interest groups	The political parties

The Hotline was founded by Bailey (and Roger Craver) in 1987, and sold to National Journal, Inc. in 1996. Bailey continues as a part-time consultant.

Founder and President Bailey, Deardourff and Associates (1968-1987)

Bailey, Deardourff was among the first national political consulting firms, working for Republican candidates for Governor, Senate and president including:

President Ford; Senators Brooke, Bond, Danforth, Percy, Schweiker, Chaffee, Lugar, Stafford, Baker; Governors Kean, Milliken, Rhodes, Orr, Bowen, J. Thompson, Alexander, Bond, Snelling, Cahill, Thornburgh, Rhodes, Ray, Quie, DuPont.

Education

A.B.Colgate University, 1954

M.A., M.A.L.D., Ph.D, The Fletcher School of Law and Diplomacy, Tufts 1957-1962

Publications Within Last 10 Years - Douglas L. Bailey

If the Policitians Really Want to Help..., L.A. Times, Sept. 20, 2005, at 13 (and in other newspapers, co-authored with Gerald Rafshoon).

How Issue Ads Are Designed to Target Federal Candidates without "Express Advocacy," in *Inside the Campaign Finance Battle*, 252-53 (Corrado, Mann, Potter, eds., 2003).

A Prime-Time Opportunity for Voters?, Cleveland Plain Dealer, June 29, 1996, at 10B.

[FEC Exhibit 15]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260 (DBS, RWR, RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF
v.
FEDERAL ELECTION COMMISSION, DEFENDANT
AND
SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

[Filed: July 14, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 15 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

WESTLAW factiva

11/18/03 MLWK 2A

11/18/03 Milwaukee J. & Sentinal 2A
2003 WL 58672357

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Tuesday, November 18, 2003

News

3 seeking Feingold seat attack him on judges issue

CRAIG GILBERT
cgilbert@journalsentinel.com

3 seeking Feingold seat attack him on judges issue. Republicans see Senate fight as important to voters.

By CRAIG GILBERT cgilbert@journalsentinel.com. Journal Sentinel.

Tuesday, November 18, 2003.

Washington—Amid a lot of bitter venting on both sides, Pennsylvania Republican Arlen Specter defended last week's marathon Senate debate on the blocking of a handful of Bush judicial nominees.

"We're trying to make C-SPAN the channel of choice," said Specter, who called the round-the-clock speech-a-thon "even more interesting than the soaps."

North Dakota Democrat Bryon Dorgan suggested C-SPAN watchers were having a different reaction – that we're "just a bunch of windbags in blue suite."

When it comes to the war over federal judges, there's virtually nothing the two parties agree on.

Not who's right and who's wrong.

Not how it plays politically.

Not whether anybody out there even cares.

In Wisconsin, the three Republicans vying to take on Senate Democrat Russ Feingold are attacking him on judges and assert the controversy resonates with voters. Feingold and fellow Senate Democrat Herb Kohl both sit on the Judiciary Committee.

"I think it will be a huge issue," said GOP Senate candidate Russ Darrow. Feingold doubts that.

"My opponents are trying to latch onto this, I think, because they're really stubbing their toes on some of their other issues." Feingold said. "People are much more focused on the health care and jobs and Iraq."

Whether the fight on judges remains a C-SPAN story—fodder mainly for each party's hard core—or looms larger in the 2004 elections may be answered in contests like Feingold's.

For now, it epitomizes an angry hardening between the parties in Washington. Last week's debate was a classic case of two sides talking past each other to their cheering sections at home, with ever dwindling portions of senatorial goodwill.

Utah Republican Orrin Hatch accused Democrats of treating President Bush's judicial nominees like "dirt."

Bush called the Democrats' conduct "shameful." New York Democrat Hillary Rodham Clinton said the nominees blocked by Democrats were "lemons." Massachusetts Democrat Edward Kennedy said Democrats would "continue to resist any Neanderthal that is nominated by this president."

Republicans are furious over the fact that Democrats have taken an entrenched tactic of the party out of power, the Senate filibuster, and applied it where it has rarely been used in the past—the confirmation of a president's nominees to the federal court.

The threat of a filibuster means it takes 60 votes to pass something, not a simple majority of 50.

That has allowed Senate Democrats to stop or delay six nominees (including two new ones Friday) who otherwise would win majority approval. All those nominees are for the federal appellate courts.

Democrats respond that they've approved the overwhelming majority of Bush's judicial picks—168 confirmed, six blocked. And they say Republicans used different tactics to kill far more nominations by the previous president, Democrat Bill Clinton.

Hypocrisy, extremism charged.

The result of the escalating judicial wars is an intensely partisan standoff featuring mutual accusations of hypocrisy and extremism. In Washington, the issue is often portrayed as a hot button that stokes activists and raises money but hasn't engaged average Americans.

Republicans are hoping to change that.

State Republicans Chairman Rick Graber contends that with both Kohl and Feingold on the Senate Judiciary Committee, Wisconsin Republicans are "very well aware of (the issue). It's something the Senate candidates (against Feingold) are talking about at every stop. I think talk radio is talking about it around the state."

As for the broad public, Graber said, "I have a tough time arguing that it's up there with the economy and the war against terrorism," but "to say no one's paying attention is wrong."

Graber accuses Kohl, Feingold and other Democrats of "playing strictly political games" and of "incredible hypocrisy" for demanding nominees get a vote when Bill Clinton was president, then depriving some nominees of votes under Bush.

Vacancy rate under 5%.

Kohl, who is not up for re-election, took to the floor during debate Thursday to note that more than 95% of federal judgeships are filled, the highest rate in well over a decade.

"When you have a vacancy rate of less than 5 percent, how can anyone make the argument that there is something sinister going on?" Kohl asked.

"When I bring these facts up to audiences (in Wisconsin), some of which are more or less inclined to be Republicans, the issue just ends," Kohl said in an interview.

Kohl said of Republicans: "To say they should get to nominate and vote on and install any and every judge? That the minority has no rights? That to me is extreme."

Kohl's office said last week that he had voted for 94.8% of Bush's judicial nominees and opposed 12 nominees for the federal bench in 15 years.

The issue is sure to be joined in the Feingold Senate campaign.

Feingold 'blindly followed.'

In a statement Friday, Republican hopeful Bob Welch said Feingold "has blindly followed the liberal leadership of his party who are intent on embarrassing our president at every turn."

He quoted comments Feingold made in 1999 about the GOP's failure to move a Clinton nominee: "A nomination delayed is justice delayed. As we know, justice delayed is justice denied. A vacancy unfilled is justice unfulfilled."

Welch said the filibuster of judges was a dangerous precedent that would lead to a political backlash against Democrats.

Tim Michels, another Republican Senate candidate, said nominees from both parties should routinely be entitled to up-or-down floor votes.

"I would always support a judicial nominee getting an opportunity to go in front of the Senate and receive a vote, whether it's a Republican president of Democratic president," Michels said. "This issue is rising on people's radar screens."

Darrow, the other Republican in the race, called Feingold a "leader in the stonewalling effort" of judges.

"I think it's the worst kind of politics. It's why many Americans want a new face," Darrow said.

Feingold said his 1999 comments cited by Welch and other Republicans were prompted by the failure of Senate Republicans to even grant a committee hearing to some Clinton nominee.

"What I saw during the second term of President Clinton was a systematic effort on the part of Senate Republicans to block President Clinton's right to have his judges considered," said Feingold, suggesting there was more fairness in allowing nominees to at least proceed out of committee to the floor, even if some were held to a 60-vote threshold.

"I don't agree with those who say it requires a majority vote in every case," he said.

According to his office, Feingold has voted against eight of the 168 judges confirmed so far and against seven who have not been confirmed.

Feingold said his reasons for opposing the filibustered nominees go beyond ideology to issues such as ethics or the failure to answer questions or "evidence a person is hostile to settled law."

"I don't think it's damaging if it's done on a very limited basis," Feingold said of the filibuster. "There is no role for the Senate if we just approve everybody."

------ INDEX REFERENCES -------

NEWS SUBJECT: (Domestic Politics (GPOL); Elections (GVOTE); Upper House (GVUPH); Political/General News (GCAT); Government Bodies (GVBOD); Legislative Branch (GVCNG))

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[FEC Exhibit 21]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04CV01260 (DBS)(RWR)(RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

[Filed: July 14, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 21 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

Wisconsin Right to Life NEWS RELEASE
10625 W. North Avenue, Milwaukee, WI 53226
414-778-5780 or toll free: 877-855-5007

For immediate release: Friday, March 26, 2004

Contact: Susan Armacost, Legislative/PAC Director

FEINGOLD'S, KOHL'S AND KERRY'S VOTES AGAINST UNBORN VICTIMS BILL DEMONSTRATES AN UTTER DISRESPECT FOR HUMAN LIFE!

Top Election Priorities for Right to Life Movement in Wisconsin: Re-elect George W. Bush ... Send Feingold Packing!

If there ever was an event that demonstrates how radical and out of touch some federal office holders are, one only has to look at how Wisconsin Senators Russ Feingold and Herb Kohl and presidential candidate John Kerry voted yesterday on the *Unborn Victims of Violence Act*. Feingold is running for re-election in November and John Kerry wants to be the next President of the United States.

"The passage of the Unborn Victims of Violence Act passed by a wide margin yesterday and President Bush will sign the legislation into law," said Susan Armacost, Legislative Director for Wisconsin Right to Life. "While that is a tremendous victory, it is deeply disturbing that Wisconsin's senators and John Kerry are so tied to the radical pro-abortion philosophy that they cannot even bring themselves to respect the lives of unborn children in a non-abortion context."

Wisconsin Right to Life's parent organization, the National Right to Life Committee (NRLC) was the lead national organization in promoting the *Unborn Victims of Violence Act.* In commenting on John Kerry's vote against the bill, NRLC's Legislative Director Douglas Johnson said, "Apparently, John Kerry believes that if a criminal commits a federal crime that injures a pregnant woman and kills her unborn son or daughter, prosecutors should tell the grieving mother that she did not really lose a baby."

Three national polls show that about 80% of the public agrees that a crime like the killing of Laci and Conner Peterson has two victims and should be charged as two homicides. But the position of Feingold, Kohl and Kerry is only supported by 7 to 10% of the public.

Sharon Rocha, mother of Laci Peterson and grandmother of Conner Peterson, had pleaded with Feingold to support the *Unborn Victims of Violence Act.*

After the U. S. House of Representatives passed the *Unborn Victims of Violence Act* on February 26, President George W. Bush issued a statement saying, "Pregnant women who have been harmed by violence and their families, know that there are two victims—the mother and the unborn child—and both victims should be protected by federal law. I urge the Senate to pass this bill so that I can sign it into law."

Wisconsin Right to Life worked with several families who had lost unborn children under similar tragic circumstances and with Rep. Steve Freese and State Sen. Bob Welch to enact a state unborn victims bill. Then-Governor Tommy Thompson signed the measure into law in 1998 and it is one of the strongest measures of its kind in the nation. The federal unborn victims bill

passed yesterday is necessary to address federal crimes that cannot be included in state unborn victims laws.

"One of the most important elections in the history of the right to life movement will take place in November," said Armacost. The people who represent us in Washington should, at the very least, have some modicum of respect for human life. Apparently, Feingold, Kohl and Kerry do not. This issue only increases our resolve to do everything possible to win Wisconsin for President Bush and to send Russ Feingold packing!"

[FEC Exhibit 22]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260 (DBS, RWR, RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF
v.
FEDERAL ELECTION COMMISSION, DEFENDANT
AND
SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

[Filed: July 14, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 22 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

Wisconsin Right to Life PAC NEWS RELEASE
10625 W. North Avenue, Milwaukee, WI 53226
414-778-5780 or toll free: 877-855-5007
***For immediate release*: Friday, March 5, 2004**

Contact: Bonnie Pfaff, WRL/PAC Chair: 608-488-4200
Susan Armacost, WRL/PAC Director: 414-778-5780 or toll free: 877-855-5007

Wisconsin Right to Life Political Action Committee
Presidential – U. S. Senate Endorsements

Top Election Priorities: Re-elect President Bush...Send Feingold Packing

(Milwaukee, WI): The Wisconsin Right to Life Political Action Committee today announced that it has endorsed President George W. Bush for re-election to the presidency and has endorsed Bob Welch, Russ Darrow and Tim Michels in the Republican primary for the U. S. Senate.

"President Bush wants to continue his work in upholding the sanctity of human life," said Bonnie Pfaff, Chair of the WRL/PAC. "It is imperative that the President be elected to a second term for the sake of the most vulnerable members of the human family."

Pfaff also stressed the importance of defeating radically pro-abortion Russ Feingold in the U. S. Senate race. "No category of state or federal lawmaker has more influence on the fate of unborn babies than those individuals who are elected to serve in the United States Senate. Senators not only vote on legislation affecting the sanctity of human life but they have the power to confirm or not confirm the President's judicial nominations. And it is in the U. S. Supreme Court where the fate of *Roe* v. *Wade* will ultimately be decided. We do

not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees."

In commenting on the three endorsed U. S. Senate candidates, Pfaff said, "Bob Welch has been a champion for the right to life cause during his distinguished political career in the state legislature. Time after time he has courageously fought for legislation that would enhance the dignity and sanctity of all human life. Bob Welch would take that same courage and determination with him to the U. S. Senate and continue his work on behalf of the unborn and other vulnerable individuals."

"Tim Michels and Russ Darrow would be extremely supportive of legislation that would enhance the dignity of all human life and they would oppose measures that would demean the sanctity of the human person," said Pfaff.

The three U.S. Senate candidates were extensively interviewed by the Wisconsin Right to Life Committee members and each returned the organization's federal candidate questionnaire which covers federal issues ranging from the protection of human embryos from unethical research, a ban on all human cloning, foreign aid for abortion, federal funding for abortion and a range of other key federal right to life issues.

In addition, the questionnaire asked the candidates if they would oppose a filibuster of a judicial nominee if that nominee receives a favorable or neutral-recommendation from the Senate Judiciary Committee. The three candidates all stated they would oppose a filibuster under those circumstances.

"Russ Feingold is so extreme in his anti-life position and the U. S. Senate is so important to the future of un-

born babies that the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections" said Pfaff.

[FEC Exhibit 54]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NO. 1:04CV01260 (DBS, RWR, RJL)
(THREE-JUDGE COURT)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF
V.
FEDERAL ELECTION COMMISSION, DEFENDANT
AND
SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

[Filed: July 14, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 54 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

(excerpts)

BeFair.org.

Wisconsin Right to Life URGENT E-Alert
10625 W. North Avenue, Milwaukee, WI 53226
414-778-5780 or toll free: 877-855-5007

July 14, 2004

FILIBUSTERS BY FEINGOLD, KOHL
OF THE PRESIDENT'S JUDICIAL NOMINEES
MUST STOP!

The Courts are Crucial to the Right to Life Cause

Is it fair for Senators Feingold and Kohl to continually vote to filbuster the President's judicial nominees? You probably agree that the President's nominees deserve an up or down vote in a reasonable time frame. Yet, 16 out of 16 times over the past two years, Feingold and Kohl have voted to filibuster certain of the President's nominees. Seven of the votes were against Miguel Estrada, an individual who has worked in administrations of both parties, received a unanimous well-qualified rating by the American Bar Association, and would have been the first Latino to sit on the Court of Appeals for the District of Columbia. Estrada finally withdrew his nomination after waiting two years to be confirmed.

Feingold and Kohl are putting politics into the court system, creating gridlock, and costing taxpayers money.

In the upcoming months, votes on up to 25 judicial nominees will come before the U.S. Senate. Feingold and Kohl and their colleagues are likely to filibuster most or all of these nominees.

You can help! Because of the importance of the federal courts to the right to life cause, Wisconsin Right to Life urges you to e-mail or call Feingold and Kohl and urge them to be fair and allow an up or down vote on the President's judicial nominees. Tell them to stop filibustering and allow the court system to operate efficiently. Urge your friends and family to do the same.

Senator Russ Feingold
202-224-5323
russell.feingold@feingold.senate.gov

Senator Herb Kohl
202-224-5653
You must go to his web site and type in a message:
kohl.senate.gov/gen_contact.html

Barbara Lyons

From: PACMembers-owner@wrtl.org on behalf of Legislative [legis@wrtl.org]

Sent: Monday, July 26, 2004 4:58 pm

To: Legislative

Subject: Wisconsin Right to Life

BeFair.org.

Wisconsin Right to Life NEWS RELEASE
10625 W. North Avenue, Milwaukee, WI 53226
414-778-5780 or toll free: 877-855-5007

For release on Tuesday morning, July 27, 2004
Contact: Barbara Lyons, Executive Director
Susan Armacost, Legislative Director

WISCONSIN RIGHT TO LIFE SPEAKS OUT REGARDING JUDICIAL FILIBUSTERS AND MCCAIN-FEINGOLD RESTRICTIONS

WHAT: NEWS CONFERENCE

WHEN: Wednesday, July 28, 2004 10 a.m.
Assembly Parlor
State Capitol, Madison, WI

WHY: Wisconsin Right to Life (WRL), headquartered in Milwaukee, will announce an initiative of na-

tional significance to inform Wisconsin citizens regarding the participation of their Senators, Russ Feingold and Herb Kohl, in Democratic filibusters to block confirmation of judicial nominees. WRL will also announce steps it is taking to challenge the Bipartisan Campaign Reform Act (better known as the McCain-Feingold).

FAST FACTS:

- On 20 occasions since March of 2003, most of the Senate Democrats have voted to block confirmation of various judicial nominees.
- In the 215-year history of our country, a filibuster has blocked no judicial nominee—until now.
- The nominees are the most qualified of any recent administration, with 99 percent receiving qualified or well-qualified ratings from the American Bar Association (ABA). A well-qualified rating by the ABA was once considered a "gold" standard by Senate Democrats.
- Nominee Miguel Estrada withdrew his nomination after waiting two years to be confirmed and after seven attempts to break a filibuster over his nomination failed.
- McCain-Feingold, in part, restricts the rights of organizations to discuss issues of public concern and to conduct grassroots lobbying for favored legislation 30 days before a primary election, caucus, or convention of a political party, or 60 days before a general election.

NOTE: No advance interviews will be given. Visit our new website devoted exclusively to these issues at www.befair.org For other Wisconsin Right to Life issues, visit our general website at *www.wrtl.org.*

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Barbara Lyons

From: PACMembers-owner@wrtl.org on behalf of Wisconsin Right to Life [legis@wrtl.org]

Sent: Wednesday, March 16, 2005 11:54 AM

To: Wisconsin Right to Life

Subject: Judicial Fillibuster Alert!

BeFair.org.

A project of Wisconsin Right to Life
10625 W. North Avenue, Milwaukee, WI 53226
414-778-5780 or toll free: 877-855-5007

FILIBUSTERS OF JUDICIAL NOMINEES REAR UGLY HEAD ONCE AGAIN; STAKES COULDN'T BE HIGHER AS CONFIRMATION OF THOSE FILIBUSTERED LAST SESSION HEADS FOR A VOTE ON U.S. SENATE FLOOR

Fight is Prelude to the Potential Naming of a U.S. Supreme Court Nominee

The U.S. Senate is bracing for another high-stakes battle on President Bush's judicial nominees. Refusing to fold, the President has re-submitted the names of nominees who were filibustered in the last congressional session. Democratic Senators, including our own *Senators Feingold and Kohl*, are once again threatening to filibuster these nominees, forcing a 60 vote majority for confirmation rather than a normal majority.

Republican Senators have threatened to initiate what they call the "nuclear option" to dismantle the filibuster. They apparently have the votes to change Senate rules to prohibit the use of filibusters on judicial nominees. Democrats have threatened to completely tie up the work of the Senate if the Republicans adopt the nuclear option. All of this is a prelude to potential resignations to the U.S. Supreme Court and the enormous battle which is certain to be waged to confirm whoever is named.

ACTION NEEDED

Please contact Senators Kohl and Feingold and urge them to allow an up and down vote on ALL judicial nominees.

For more information on the filibusters and how to contact Senators Kohl and Feingold please visit www.befair.org. This is one of Wisconsin Right to Life's websites and is devoted entirely to the filibuster issue.

[FEC Exhibit 70]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260 (DBS, RWR, RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

[Filed: Sept. 1, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 70 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

- BARBARA LYONS

FROM: PACMembers-owner@wrtl.org on behalf of Legislative [legis@wrtl.org]

SENT: Thursday, July 15, 2004 12:27 PM

TO: Legislative

SUBJECT: Wisconsin Right to Life E-Update

Wisconsin Right to Life E-Update
10625 W. North Avenue, Milwaukee, WI 53226
414-778-5780 or toll free: 877-855-5007

July 15, 2004

Items in this E-Update:

1. Fr. Frank Pavone (Priests for Life) Coming on Sept. 16 - Save the Date!
2. Candidate Information Can be Accessed on WRL Website
3. Reversal of *Roe* v. *Wade* is Possible *if* Pres. Bush is Re-elected
4. Tell Feingold/Kohl to Stop Filibustering the President's Judicial Nominees
5. H.R. 4682 (Federal Funding of Embryonic Stem Cell Research)

Father Frank Pavone Coming to Milwaukee and Green Bay on September 16!

For the first time in 20 years, the reversal of *Roe* v. *Wade* is a real possibility if our nation elects individuals

who cherish the sanctity of human life. Father Frank Pavone will be both in Green Bay and in Milwaukee at two exciting events. He wants to meet you and talk with you about the responsibility all of us have to vote and the importance of the pro-life issues in making our voting decisions. As a nationally-known advocate for the unborn and the founder and director of Priests for Life, you will not want to miss meeting Fr. Pavone! See details below rgarding both events.

Milwaukee Event with Father Pavone:

September 16, 2004—Varsity Theatre, Marquette University—7:30 to 9:00 p.m. Light refreshments will be served. Father Pavone's Milwaukee appearance is sponsored by Catholic Knights, Caritas for Children, Marquette Students for Life, Priests for Lfe and Wisconsin Right to Life. Music will be provided by Theiss and O'Conner. Refreshments will be served. Admission is free but donations will be gratefully accepted. Reservations accepted by phone only (toll free: 877-855-5007).

Green Bay Event With Father Pavone:

September 16, 2004 - 11:30 to 1:00 p.m. - Riverside Ballroom, 115 Newhall St. Admission is $10.00 which includes lunch. (Renowned Riverside Ballroom homemade chicken dumpling soup will be served with lunch). Father Pavone's Green Bay appearance is sponsored by Priests for Life and Wisconsin Right to Life. Reservations accepted by phone only (toll free: 877-855-5007).

Candidate Information Can Be accessed on the Wisconsin Right to Life Website

Don't know where candidates stand on right to life issues? Candidate information is only a click away by going to Wisconsin Right to Life website at www.wrtl.org. Currently, you can find the voting records for state and federal legislators by going to the WRL website and clicking on "Find Out How They Voted." Beginning on July 25, you will also find the complete list of Wisconsin Right to Life PAC endorsed candidates, both state and federal, by clicking on "Wisconsin Right to Life PAC Endorsed Candidates."

The Reversal of *Roe v. Wade* is a Real Possibility if President Bush is Re-elected and Radically Pro-Abortion U.S. Senators Like Russ and Feingold are Defeated!

For the first time in 20 years, the reversal of *Roe* v. *Wade* is a real possibility but it won't happen unless the president we elect on November 2, 2004 will nominate justices amenable to overturning *Roe*. The differences between President Bush and John Kerry couldn't be more stark when it comes to the right to life issues. John Kerry is so radical on the issue of abortion and has such disdain for the lives of unborn children that he even voted to keep partial-birth abortions legal and voted against the *Unborn Victims of Violence Act* (the Laci Peterson Law.) President Bush signed both of those important measures into law. John Kerry has also said that he would only appoint Supreme Court Justices who support the tragic *Roe* v. *Wade* decision.

The individuals who represent us in the U.S. Senate are also crucial to whether *Roe* v. *Wade* will be overturned because it is the U.S. Senate that must confirm

the President's judicial nominees. If Russ Feingold's past actions are any indication of how he would vote on the President's Supreme Court nominees, we can expect him to thwart each and every one of the President's Supreme Court nominees. When voting on other Bush nominees for other very important federal courts, Feingold has voted to filibuster those nominees 16 out of 16 times!

There are a number of Republican candidates running in the September primary and the candidate who wins the primary election will face Feingold in the November general election. Of the Republican candidates running, only three have a chance to win the primary and go on to challenge Feingold. They are State Senator Bob Welch, Russ Darrow and Tim Michels. All three of these fine candidates hae been endorsed by the Wisconsin Right to Life Political Action Committee (WRL/PAC) and WRL/PAC will vigorously support whichever of the 3 wins the primary. All three candidates have pledged to allow an up or down vote on the President's judicial nominees. In addition, they are all vigorously opposed to the destruction of human embryos for research purposes, they are opposed to all human cloning, they are opposed to funding abortion overseas and in our own country, and they all oppose *Roe* v. *Wade* and want unborn children protected. Russ Feingold has the opposite position on all of those issues! Russ Darrow does support rape and incest exceptions in very limited circumstances. While this not the position of Wisconsin Right to Life (WRL strongly opposes rape and incest exceptions), the stark contrast between Feingold and Darrow on right to life issues speaks for itself and WRL/PAC will strongly support Darrow if he is the winner of the primary.

Tell Feingold and Kohl to Stop Filibustering the President's Judicial Nominees

Both Feingold and Kohl have voted 16 out of 16 times to filibuster President Bush's judicial nominees for the very important federal courts. Seven of their votes were against Manual Estrada, who received a unanimous well-qualified rating from the American Bar Association. After two years of having his nomination stalled, this excellent nominee withdrew his name from consideration. It's just not fair! And there are approximately 25 additional judicial nominees who are expected to come before the U.S. Senate in the coming months.

The role the federal courts play in ruling on right to life issues is enormous! Some of the federal courts are extremely hostile to the right to life movement and those are the courts to which the Planned Parenthoods of the world go when they want right to life laws (like the Partial-Birth Abortion Ban Act of 2003) struck down.

Please contact Feingold and Kohl immediately and urge them, in the sense of fairness, to allow an up or down vote on each of those nominees! Please both call and e-mail them. Senator Feingold's phone number is 202-224-5323. You can e-mail him at: russell_feingold@feingold.senate.gov. Senator Kohl's phone number is 202-224-5653. To e-mail him you must do it by going to his website at http://kohl.senate.gov.

H.R. 4682 (Dealing with Federal Funding of Embryo Research)

Several people have contacted us regarding a federal bill offered by supporters of federal funding for destroying human embryos for research purposes (H.R. 4682). They evidently received information about this bill that

gave the impression that H.R. 4682 was proceeding through the U.S. House. This legislation was introduced on June 24 by Rep. Mike Castle (R-Del.) The day after the bill was introduced (June 25), House Speaker Dennis Hastert publicly announced that he would not allow the bill to go forward. H.R. 4682 has been dead since June 25.

In the very short term, this is good news. But the supporters of embryonic stem cell research will be looking for other legislative avenues to promote the federal funding of embryonic stem cell research, such as appropriations bills, etc. So, we must continue to be vigilant in expressing our strong opposition to the destruction of human embryos for research purposes. When you contact you members of congress about this issue, please tell them you oppose any legislative initiative whatsoever that would promote the destruction of human embryos for research purposes. That way, regardless of which legislative avenue is chosen by the promoters of embryonic research, all bases are covered. If we hear of a specific legislative initiative regarding this topic that is moving forward, we will immediately let you know.

If you don't know who your congressional representative is or you don't know how to contact them, just go to the Wisconsin Right to Life Legislative Information Center which can be accessed at the Wisconsin Right to Life website at www.wrtl.org. Then just click on "Legislative Information Center. Just follow the instructions to find out who your representative is and complete contact information for your representative will appear. You can even e-mail your representative directly from the WRL Legislative Information Center.

If you receive future communications from sources other than Wisconsin Right to Life or the National * * *.

[FEC Exhibit 73]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260 (DBS, RWR, RJL)
(Three-Judge Court)

Wisconsin Right to Life, Inc., plaintiff
v.
Federal Election Commission, defendant
and
Sen. John McCain, et al.,
intervenor-defendants

[Filed: Sept. 1, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 73 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

VOLUME 4, NUMBER 1 • SPRING 2004

LIFE WITHOUT LIMITS

The quarterly magazine of Wisconsin Right to Life

BORN ALIVE INFANT PROTECTION ACT BECOMES LAW

WHAT'S INSIDE? * * *

RADICALLY PRO-ABORTION FEINGOLD MUST GO!

U.S. SENATE WILL DETERMINE THE FATE OF MILLIONS OF UNBORN BABIES

[PHOTO OMITTED]

No category of state or federal lawmaker has more influence on the fate of unborn babies than those individuals who are elected to serve in the United States Senate.

United States Senators vote on legislation that affects the sanctity of the lives of the most vulnerable members of the human family. But U.S. Senators also vote to either confirm or not confirm the federal judicial nominees of the president. Currently, a number of President Bush's federal judicial nominees have been blocked by Bush's opponents from receiving a vote by the full Senate. One of the major reasons these nominees have been blocked is a fear on the part of the pro-abortion movement that the president's nominees would uphold pro-life laws.

But the real battle will be over nominees to the U.S. Supreme Court. If the pro-abortion crowd is worried about Bush's federal judicial nominees at lower levels, they are frantic regarding Supreme Court nominees. After all, if Bush is able to change the makeup of the Supreme Court, the reversal of *Roe* v. *Wade* becomes a real possibility!

Currently U.S. Senator Russ Feingold has maintained a 0% voting record on right-to-life issues. Feingold's defense of the gruesome partial-birth abortion procedure is legendary, particularly after he said that even if the baby were fully outside the mother's body, the woman should still have the right to decide if the baby should live or die. In addition, Feingold has been active in his opposition to Bush's judicial nominees and is expected to be particularly active in opposition to U.S. Supreme Court nominees.

The three major Republican U.S. candidates are State Senator Bob Welch, Tim Michels and Russ Darrow. Each of the candidates was interviewed by the Wisconsin Right to Life Political Action Committee. In addition, all three candidates returned the federal candidate questionnaire which covers federal issues ranging from the protection of human embryos from unethical research, the cloning of human embryos for research purposes, federal funding of abortion, foreign aid for abortion, euthanasia and other key federal right-to-life issues.

[PHOTO OMITTED]	[PHOTO OMITTED]	[PHOTO OMITTED]
Russ Darrow (R) Founder and of Head Russ Darrow Group	Tim Michels (R) Co-Owner and Vice President of Michels Corp., Brownsville, Wis.	Bob Welch (R) State Senator from Red-granite, Wis.

Darrow, Michels and Welch said they would oppose a filibuster of a judical nominee if that nominee receives a favorable or neutral recommendation from the Senate Judiciary Committee.

Regarding whether abortion should remain legal, Michels and Welch would oppose exceptions in cases of incest and forcible rape while Darrow would support those exceptions.

Russ Feingold is so extreme in his anti-life position and the U.S. Senate is so important to the future of unborn babies that the defeat of Feingold must be uppermost in the minds of Wisconsin's pro-life community in the 2004 elections!

FEINGOLD MUST GO!

Authorized and paid for by the Wisconsin Right to Life PAC, Richard Fox, Treasurer. Not authorized by any candidate.

[PHOTO OMITTED]
Sen. Lazich

[PHOTO OMITTED]
Rep. Gundrum

Born Alive Infant Protection Act BecomesWisconsin Law

Sen. Mary Lazich (R-New Berlin).

The *Born Alive Infant Protection Act* clarifies that every baby born alive after an abortion has the same legal status under Wisconsin law as an infant born alive after a natural or induced delivery or a Caesarean section.

Dramatic testimony on behalf of the legislation earlier in the legislative session highlighted the need to enact a law that would protect survivors of abortion.

Rep. Gundrum and Sen. Lazich were dedicated in their resolve to have this legislation enacted into law when they learned of the atrocities inflicted on many babies who are born alive after being aborted.

"We are deeply appreciative of Rep. Gundrum, Sen. Lazich and the leadership of both houses of the state legislature," said Susan Armacost, Wisconsin Right to Life legislative director. "These legislators recognized the human rights abuses that were inflicted on many abortion survivors and were appalled by it! As a result, they moved swiftly to rectify the situation."

Did you know?

Wisconsin Right to Life has been the lead organization involved in the creation, promotion and enactment of all pro-life laws enacted in Wisconsin since the mid-1970s.

[FEC EXHIBIT 74]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260 (DBS, RWR, RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN, ET AL.,
INTERVENOR-DEFENDANTS

[Filed: Sept. 1, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 74 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

Volume 4, Number 2 • Summer 2004

LIFE Without Limits

The quarterly magazine of Wisconsin Right to Life

[PHOTO OMITTED]

President Bush was joined on the stage by six women and men who have lost both their daughters and their unborn grandchildren in violent crimes: Sharon Rocha and Ron Grantski (victims Laci and Conner); Carol and Buford Lyons (victims Ashley and Landon); Cynthia Warner (victims Heather Fliegelman and Jonah); and Stephanie Alberts (victims Christina and Ashley Nichole). Also present was Tracy Marciniak Seavers, who survived an assault that killed her unborn son, Zachariah. For more on Tracy's long journey to the White House bill-signing, see Page 3.

Nothing More Important:

Re-Electing Pro-Life President Bush
and Defeating Pro-Abortion Russ Feingold

The Stakes Have Never Been Higher for the Right-to-Life Cause!

The top election priorities for the Wisconsin Right-to-Life Political Action Committee (WRL/PAC) are to do all it can to deliver Wisconsin for our great pro-life President George W. Bush and to defeat radically pro-abortion U. S. Senator Russ Feingold.

This is not to say that congressional and state legislative races are not crucially important. Of course they are,

and the WRL/PAC will be heavily involved in those races.

But the presidential and U. S. Senate races rise to a top priority level in 2004 because for the first time in 20 years, the reversal of *Roe v. Wade* is a distinct possibility.

In order for *Roe* to be reversed, President Bush must be re-elected so he can nominate individuals to the U. S. Supreme Court who will rule to overturn the tragic decision that legalized abortion on demand throughout the United States. Pro-abortion Democratic presidential candidate John Kerry has stated that if he is elected, he will nominate *only* U. S. Supreme Court candidates who support *Roe v. Wade.* The distinction between Bush and Kerry couldn't be clearer!

RE-ELECTING PRO-LIFE PRESIDENT BUSH AND DEFEATING RUSS FEINGOLD

The U. S. Senate is responsible for voting to confirm or reject the President's judicial nominees. One of Wisconsin's current U. S. Senators, pro-abortion Russ Feingold, faces re-election in the 2004 elections. Feingold has done everything he can to thwart a number of the President's federal judicial nominees at lower court levels and this is only a preview of what Feingold and others would do to defeat President Bush's nominees to the U. S. Supreme Court. The right-to-life community in Wisconsin must do all it can to defeat Feingold and replace him with an individual who will consider President Bush's judicial nominees in a fair manner.

The stakes have never been higher for the right-to-life cause! If you would like to assist the WRL/PAC (WIsconsin Right to Life Political Action Committee) in helping to set the stage for a reversal of *Roe v. Wade,*

contact the Wisconsin Right to Life state office toll free at 877-855-5007.

President Bush Signs *Unborn Victims of Violence Act* into Law

Surrounded by parents and grandparents of those who died in two-victim crimes, President Bush, on April 1st, signed into law the *Unborn Victims of Violence Act*, also known as "Lacie & Conner's Law."

National Right to Life Legislative Director Douglas Johnson said that the (democratic candidate for president) "Senator John Kerry voted against Laci and Conner's Law, and if Kerry were president, today would be a veto ceremony, not a signing ceremony."

Which Republican U. S. Senate Candidate will Face Feingold in November?

The Wisconsin Right to Life Political Action Committee has endorsed three pro-life Republican U. S. Senate candidates who will face each other in the September 14, 2004 primary election. The winner of that primary will go on to face radically pro-abortion Democrat incumbent Russ Feingold in the November 2 general election.

The WRL/PAC endorsed U.S. Senate candidates are Bob Welch, Russ Darrow and Tim Michels. While other candidates may enter the race, one thing is clear . . . it will be Welch, Darrow or Michels who will win the primary and then face Feingold in the general election.

All three candidates would support key pieces of federal right-to-life legislation likely to be considered by the Congress in the next legislative session. Darrow would support rape and incest exceptions in limited circumstances. In addition, all three candidates pledged to al-

low a vote by the full Senate on judicial nominees that have received either a favorable or neutral rating by the Senate Judiciary Committee.

[PHOTO OMITTED]

Bob Welch currently serves in the Wisconsin State Senate and prior to his election to the Senate, he served in the State Assembly. Welch has been a courageous leader for the right-to-life cause throughout his distinguished legislative career.

[PHOTO OMITTED]

Russ Darrow told WRL/PAC "You have my word that I will use my pro-life stance as a compass for all legislative decisions that I would make in the U. S. Senate."

[PHOTO OMITTED]

Tim Michels said, "I am 100% pro-life and I will work to defend the lives of those who cannot defend themselves."

Whichever of these fine candidates should win the September primary election, the WRL/PAC is prepared to do all it can to assist the election of that candidate.

Life Without Limits. Summer 2004

[FEC Exhibit 78]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260 (DBS, RWR, RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, 999 E. STREET, N.W., WASHINGTON, D.C. 20463, DEFENDANT

AND

SEN. JOHN MCCAIN ET AL.,
INTERVENOR-DEFENDANTS

[Filed: Sept. 1, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 78 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 04-1260 (DBS, RWR, RJL)
Three-Judge Court

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN, ET AL.,
INTERVENORS-DEFENDANTS

PLAINTIFF WRTL'S RESPONSES TO DEFENDANTS' INTERROGATORIES

Pursuant to Federal Rule of Civil Procedure 33 and the Court's August 18, 2006 Order, Wisconsin Right to Life, Inc. ("WRTL") submits these Responses to *Defendant Federal Election Commission's and Intervenor-Defendants' Second Interrogatories* ("Interrogatories") served on WRTL.

Defendants' First Set of Interrogatories

5. Describe in detail the date, amount, and source of any donation of $1,000 or more (cash or in-kind) that WRTL has received since January 1, 2002 that was donated to support WRTL's grassroots lobbying efforts.

WRTL paid for the advertisement at issue here from its general fund and not a segregated account and

therefore it is the general fund account that will reflect, albeit in an unsegregated form, the funds used to support WRTL's grassroots lobbying efforts. WRTL does not have records of solicitations which segregate solicitations and/or responses for the 2004 advertisements from general funds. WRTL provides in response a document recording all the donations from 2002 until May of 2006 of $1,000 or greater received into its General Fund, identified by type of donor (individual, nonprofit corporation ("nonprofit") or business corporation ("corporate"). *See* Attached "*Contributions to General Fund*".

Defendants' Second Set of Interrogatories

1. Describe in detail WRTL's plans during the 2004 election cycle to expend $71,000 for the purpose of making independent expenditures, as stated in paragraph 10 of the affidavit of Barbara Lyons executed on August 9, 2004, in this case.

WRTL has already produced information as to its 2004 budget for WRTL PAC, and does not reproduce it here. As made clear in the testimony of Barbara Lyons and Susan Armacost, the plans of spending for independent expenditures are fluid and depend on amounts raised, and raising funds for independent expenditures by WRTL PAC is especially difficult. Therefore, no detailed plans for spending other than those mentioned in already-provided document or testimony exist.

2. Identify by name, address, and position held within WRTL, if any, each and every person that you may call upon to serve as a witness on behalf of WRTL in this matter and provide a synopsis of each person's expected testimony.

WRTL relies on the testimony of Barbara Lyons as submitted in the Amended Verified Complaint and her supplemental affidavit. WRTL relies on the testimony of Susan Armacost, Jason Vanderground, June Weiss, as to the intent, purpose, creation and broadcast of the ads at issue in this case and the testimony of experts Charles H. Franklin III and Douglas Bailey as to existence of genuine issue ads and grassroots lobbying and of their opinions of the nature of WRTL's ads. WRTL may call upon other witnesses as well.

3. Pursuant to Fed. R. Civ. P. 36(a), for each and every response to Defendants' First Requests for Admission that does not constitute an unqualified admission, please describe in full why WRTL cannot admit or deny the matter. For each and every response by WRTL to Defendants' First Requests for Admission that does not constitute an unqualified admission or denial because WRTL lacks adequate information with which to formulate an answer, please describe in full detail the "reasonable inquiry" that WRTL conducted in an effort to formulate an answer and why the information resulting from the reasonable inquiry is inadequate to permit WRTL to answer.

WRTL assumes that Defendants' meant the actual text of Fed. R. Civ. P. 36(a): "The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully *admit or deny* the matter." (Emphasis added). There are no instances that trigger this interrogatory.

4. With respect to the three broadcast advertisements appended to your Verified Complaint in this matter, identify each person who drafted, wrote,

edited, reviewed, or otherwise assisted in the design and creation of each advertisement, and for each person identified explain in detail the work the person did in connection with the drafting, writing, editing, review, or other assistance in the design and creation of each advertisement.

Insofar as the question pertains to the vendors who did the majority of the work on the ads, the requested information has already been provided. Insofar that the interrogatory asks for information about WRTL, WRTL states that the following persons at WRTL performed the respective tasks with regard to the advertisements appended to the Verified Complaint:

Barbara Lyons: comments, suggestions and approval of the advertisements overall.

5. Identify by name, address, and position held within WRTL, if any, each and every person who contributed any information to its answers or other responses to these interrogatories or who otherwise participated in the preparation of those answers and other responses.

In addition to legal counsel in this case, the additional persons who so participated are:

Barbara Lyons
WRTL Executive Director
10625 West North Ave., Suite LL
Milwaukee, WI 53226.

The following persons gathered information consulted in forming answers or other responses to these interrogatories and other responses:

Mary Phillips
WRTL Development Director
10625 West North Ave., Suite LL
Milwaukee, WI 53226

Susan Armacost
WRTL Legislative/PAC Director
10625 West North Ave., Suite LL
Milwaukee, WI 53226

6. With respect to the alleged grassroots lobbying campaign that WRTL conducted in July-August 2004 on the judicial filibuster issue, please itemize the amounts expended by WRTL to conduct each phase of that campaign, including but not limited to the planning and "concepting" of the campaign (as described by Barbara Lyons in her May 18, 2006 deposition), the creation and production of the broadcast advertisements, and the costs for the airtime for each advertisement that was actually aired in each of the three media markets used by WRTL.

WRTL provides the attached documents: *See* attached "Working Budgets for Special Initiative."

7. With respect to money that WRTL solicited for its alleged grassroots lobbying campaign concerning judicial filibusters, list: a) the total amount of money raised; b) the number of individual donors and the total amount that was raised from individual donors; c) the number of business corporation donors and the total amount that was raised from business corporations; d) the number of non-profit corporation donors and the total amount that was raised from non-profit corporations; e) the amount of each donation from an individual that was equal to or

greater than $5000; f) the amount of each donation from a business corporation that was equal to or greater than $5000 and, for each such donation, the name and address of the business corporation; and g) the amount of each donation from a non-profit corporation that was equal to or greater than $5000 and, for each such donation, the name and address of the non-profit corporation.

WRTL answers in accordance with the agreement of the parties and the court's August 18, 2006 order which limits identification of donors to whether they were individual, nonprofit or business corporation. WRTL does not have records of solicitations which segregate solicitations and/or responses for the 2004 advertisements from general funds. WRTL provides, in response to Defendants' First Set of Interrogatories #5, a document recording all the donations from 2002 until May of 2006 of $1,000 or greater received into its General Fund, identified by type of donor (individual, nonprofit corporation ("nonprofit") or business corporation ("corporate"). *See* Response to Defendants First Set of Interrogatories, Number 5, *supra*; *"Contributions to General Fund"*.

8. For each corporate donation to WRTL in 2004 that was equal to or greater than $10,000, list the name and address of the corporation, and the amount and date of each donation.

WRTL answers in accordance with the agreement of the parties and the court's August 18, 2006 order which limits identification of donors to whether they were individual, nonprofit or business corporation. WRTL provides, in response to Defendants' First Set of Interrogatories #5, a document recording all the donations

from 2002 until May of 2006 of $1,000 or greater received into its General Fund, identified by type of donor (individual, nonprofit corporation ("nonprofit") or business corporation ("corporate"). *See* Response to Defendants First Set of Interrogatories, Number 5, *supra; "Contribution to General Fund".*

Verification

I affirm under the penalties for perjury that the foregoing statements are true.

/s/ BARBARA L. LYONS
BARBARA L. LYONS

Date: 8/24/06

Barbara L. Lyons, WRTL Exec. Dir.

Respectfully submitted,

/s/ JAMES BOPP, JR.
JAMES BOPP, JR.

. Miller Baker, D.C. Bar #444736
ichael S. Nadel, D.C. Bar #470144
cDERMOTT WILL & EMERY LLP
)0 Thirteenth Street, NW
'ashington, D.C. 20005-3096
)2/756-8000 telephone
)2/756-8087 facsimile
)cal Counsel for Plaintiff

James Bopp, Jr.
Richard E. Coleson
Jeffrey P. Gallant
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3501
812/232-2434 telephone
812/234-3685 facsimile
Lead Counsel for Plaintiff

Contributions to General Fund

Cont Amt	Cont Date	Cont Class
$1,000.00	1/10/2002	Individual
$5,000.00	1/25/2002	Individual
$1,000.00	4/26/2002	Individual
$5,000.00	6/4/2002	Individual
$5,000.00	6/4/2002	Individual
$1,000.00	6/4/2002	Individual
$1,000.00	6/5/2002	Individual
$1,000.00	6/6/2002	Nonprofit
$20,000.00	6/11/2002	Individual
$1,000.00	6/11/2002	Individual
$1,000.00	6/19/2002	Individual
$1,000.00	6/28/2002	Individual
$1,000.00	7/19/2002	Individual
$1,981.00	7/23/2002	Individual
$1,000.00	7/24/2002	Individual
$1,500.00	7/26/2002	Nonprofit
$1,000.00	7/30/2002	Individual
$2,000.00	10/18/2002	Individual
$1,500.00	10/25/2002	Individual
$1,000.00	1/15/2003	Individual
$22,000.00	2/21/2003	Individual
$1,000.00	3/21/2003	Individual
$3,000.00	3/28/2003	Individual
$1,000.00	4/23/2003	Individual
$1,000.00	5/6/2003	Nonprofit
$1,000.00	6/19/2003	Individual

Contributions to General Fund

Cont Amt	Cont Date	Cont Class
$1,000.00	7/22/2003	Individual
$1,000.00	7/29/2003	Individual
$1,500.00	9/11/2003	Individual
$1,000.00	11/19/2003	Nonprofit
$1,500.00	11/26/2003	Nonprofit
$1,000.00	12/31/2003	Individual
$1,000.00	12/31/2003	Corporate
$1,000.00	12/31/2003	Individual
$1,000.00	1/23/2004	Individual
$1,800.00	1/28/2004	Nonprofit
$1,000.00	3/11/2004	Individual
$1,000.00	4/13/2004	Individual
$2,500.00	4/27/2004	Individual
$2,500.00	6/9/2004	Individual
$1,000.00	6/15/2004	Individual
$5,000.00	6/24/2004	Corporate
$2,500.00	7/6/2004	Individual
$11,367.86	7/13/2004	Individual
$2,000.00	7/14/2004	Nonprofit
$50,000.00	7/15/2004	Individual
$50,000.00	7/15/2004	Corporate
$5,000.00	7/26/2004	Corporate
$2,000.00	8/4/2004	Nonprofit
$5,000.00	8/6/2004	Individual
$20,000.00	8/13/2004	Individual
$10,000.00	8/25/2004	Individual

Contributions to General Fund

Cont Amt	Cont Date	Cont Class
$10,000.00	8/29/2004	Individual
$5,000.00	8/29/2004	Individual
$1,000.00	9/9/2004	Corporate
$50,000.00	9/9/2004	Corporate
$100,000.00	9/9/2004	Individual
$1,000.00	9/14/2004	Individual
$10,000.00	9/14/2004	Nonprofit
$5,000.00	9/15/2004	Individual
$1,000.00	9/17/2004	Nonprofit
$2,000.00	10/4/2004	Individual
$1,500.00	10/15/2004	Individual
$1,000.00	10/20/2004	Individual
$5,733.04	10/25/2004	Individual
$20,000.00	10/25/2004	Nonprofit
$25,000.00	10/29/2004	Individual
$1,000.00	11/3/2004	Individual
$10,000.00	11/6/2004	Corporate
$140,000.00	11/30/2004	Corporate
$1,000.00	12/7/2004	Nonprofit
$2,500.00	1/9/2005	Individual
$3,000.00	1/9/2005	Individual
$1,000.00	1/11/2005	Individual
$1,000.00	1/18/2005	Individual
$50,000.00	1/25/2005	Individual
$6,000.00	2/22/2025 [*sic*]	Individual
$1,500.00	4/8/2005	Individual

Contributions to General Fund

Cont Amt	Cont Date	Cont Class
$1,300.00	5/23/2005	Individual
$33,473.19	6/9/2005	Individual
$2,000.00	6/22/2005	Nonprofit
$1,000.00	7/1/2025 [*sic*]	Individual
$1,000.00	7/22/2005	Individual
$1,000.00	8/3/2005	Individual
$1,000.00	8/4/2005	Individual
$10,000.00	10/8/2005	Individual
$25,000.00	11/18/2005	Individual
$2,000.00	12/16/2005	Individual
$1,000.00	1/6/2006	Individual
$1,000.00	2/13/2006	Nonprofit
$1,600.00	3/6/2006	Individual
$1,000.00	3/16/2006	Individual
$1,000.00	4/26/2006	Corporate
$804,255.74		

Wisconsin Right to Life *Working Budgets for Special Initiative*

Component	Working Budget	Agency Fees	Outside Costs	Description
Statewide Survey	$18,000	$-	$18,000	Outside costs for research partner to prepare for, field, and analyze statewide phone survey.
Strategic Planning and Message Development	$20,000	$20,000	$-	Fees for conducting discovery, assisting with quantitative research, developing a strategic action plan, and creating a message matrix.
Creative Concepting/ Development	$30,000	$30,000	$-	Fees for concepting multiple TV/Radio commercials for each phase of the campaign.
Media Planning and Buying	$10,000	$5,500	$4,500	Fees for coordinating various media activities, trafficking materials to media outlets, and processing media invoices. Outside costs for media services involved in preparing a statewide media plan and executing the media buy.
Dedicated Website Development	$20,000	$10,000	$10,000	Fees for project/content management, creative direction, copy-writing, design, and activity/feedback reporting. Outside costs for interactive partner to register, build, and host the actual site
TV/Radio Production	$47,780	$9,160	$38,600	For producing anti-filibuster spots including: 1) "Waiting" TV; 2) "Wedding" Radio; and 3) "Loan" Radio.
Public Relations	$15,830	$2,500	$13,330	Fees for coordinating various PR activities. Outside costs for public relations partner to execute a national media relations campaign.
Media Costs	$210,129	$-	$210,129	First three weeks of media costs for anti-filibuster phase
IVR Calls	$12,000	$-	$12,000	Costs for placing 100,000 IVR phone calls.
Total	$373,739	$77,160	$306,559	

BEST AVAILABLE COPY

[FEC Exhibit 90]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260 (DBS, RWR, RJL)
(Three-Judge Court)

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN ET. AL.,
INTERVENOR-DEFENDANTS

[Filed: Sept. 1, 2006]

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBIT 90 SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

BeFair.org

FOR IMMEDIATE RELEASE:
Tuesday, August 17, 2004

CONTACT:
Barbara Lyons or
Susan Armacost
Wisconsin Right to Life
877-855-5007
blyons@wrtl.org
sarmacost@wrtl.org

James Bopp, Jr.
Bopp, Coleson & Bostrom
812-232-2434 (office)
812-243-0825 (cell)
jboppjr@aol.com

WISCONSIN RIGHT TO LIFE FILES APPEAL TODAY IN U.S. COURT OF APPEALS, DISTRICT OF COLUMBIA TO PROTECT INTEGRITY OF GRASSROOTS LOBBYING

New radio ads point out outrageous assault on the freedom of speech-grassroots lobbying.

MILWAUKEE, WI—Wisconsin Right to Life (WRL) is filing an appeal today in the U.S. Court of Appeals for the District of Columbia, of the U.S. District Court for the District of Columbia's decision that denied a preliminary injunction to allow Wisconsin Right to Life to air its anti-filibuster radio and television ads beyond August 14. McCain-Feingold stipulates that broadcast advertising that mentions a candidate's name that is running for a federal office must cease 30 days before a primary election. Because the U.S. District Court failed to provide injunctive relief to Wisconsin Right to Life,

the ads stopped running at the end of the day on August 14.

"The appeal we are filing today is essential in order to protect the integrity of grassroots lobbying," said James Bopp, Jr., who is representing Wisconsin Right to Life. "Due to the McCain-Feingold law, we have not only lost our right to freely engage in political discourse regarding the actions of our elected officials, but we have lost our right to lobby them."

According to Barbara Lyons, Executive Director of Wisconsin Right to Life, because the organization's previously run ads are viewed as criminal activity by the Federal Election Commission (FEC) with possible hefty fines and prison sentences if they run past August 14, the organization has begun running a new radio ad campaign pointing out the outrageous assault on the Wisconsin Right to Life's freedom of speech and the right of citizens to be informed regarding the actions of their elected officials.

More

The text of the new radio ad, which is entitled "News Bulletin," is as follows:

"Due to recent legislative restrictions and government red tape, our regularly scheduled freedom of speech cannot be aired at this time.

Because of campaign finance reform, our anti-filibuster ads . . . the ones questioning the blocking of qualified judicial nominees from a simple "yes" or "no" vote . . . well, ads like these aren't allowed on the air as of August 15.

Does that seem fair to you?

More restrictions on free speech. Less information. Was that really the intent of campaign finance reform?

To find out more about what Washington says we can't say here, visit BeFair.org. That's BeFair.org.

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee."

All of the documents filed in the case, the previously run radio and television ads and the new radio ad as well as other information about the lawsuit are available online at Wisconsin Right to Life's website www.befair.org that is devoted to this issue. For all other information about Wisconsin Right to Life, visit the organization's general website at www.wrtl.org.

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BeFair.org

Wisconsin Right to Life URGENT E-ALERT
10625 W. North Avenue, Milwaukee, WI 53226
414-778-5780 or toll free: 877-855-5007

Tuesday, August 17, 2004

IMMEDIATE ACTION NEEDED!
YOU ARE NEEDED TO URGE FEINGOLD TO DEBATE

New Radio Ads Feature Assault on Free Speech to Do Grassroots Lobbying

Wisconsin Right to Life is appealing last week's lower court decision asking for permission to run our radio and television ads into the blackout period created by McCain-Feingold campaign finance reform.

The fight is not over! We are appealing the decision to the Court of Appeals for the District of Columbia. And, we are challenging Feingold to a debate over this assault on free speech.

Senator Feingold was quoted in the August 23 *Milwaukee Journal Sentinel* as saying that he is willing to talk about McCain-Feingold with this opponents. "I am happy to talk about it any at time and at any place," stated Feingold.

Please contact Senator Feingold and urge him to debate Wisconsin Right to Life Executive Director Barbara Lyons on the free speech restriction of McCain-Feingold as well as his filibustering of President Bush's judicial nominees. Please visit www.befair.org for a direct link to Senator Feingold's office.

Our new radio ad hits hard at the assault on free speech. You can hear the new ad and review all news releases and court documents at www.befair.org. which is Wisconsin Right to Life's website dedicated just to this issue. For other information about Wisconsin Right to Life, please visit our general website at

www.wrtl.org

Thank you!

[Exhibit 7]

Transcript of Deposition of Douglas L. Bailey
Exhibit 7

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:04cv01260

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN ET AL.,
INTERVENOR-DEFENDANTS

DEPOSITION OF DOUGLAS L. BAILEY

Tuesday, June 6, 2006
[Filed: June 23, 2006]

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* * * * *

[8] organized as a 527 while we ask the question.

Q. Right. I understand.

So the group would nominate candiates and place them on the ballot for president and vice president in 2008. That's the goal?

A. Yes, sir.

Q. And then would the group conduct a campaign around those nominees?

A. No, the nominees would conduct their campaign.

Q. All right. Who first contacted you about being an expert witness in this case?

A. Way back when, the answer is Fred Werthheimer.

Q. Thinking you are saying way back when, perhaps you are referring to the McConnell litigation?

A. Yes.

Q. Let's bring it forward a little bit. With respect to the Wisconsin Right to Life versus FEC litigation, you understand you are designated as an expert in that case?

[9]

A. I do understand that I've made a declaration in that case, yeah, that's right. And your question is?

Q. Who first contacted you about being an expert in Wisconsin Right to Life versus FEC?

A. Fred Werthheimer was the person who called me and asked would I have an interest in continuing the—I don't know that he used the term "dialogue," I would —in this case and I said sure.

Q. And when was that?

A. I'm not going to be good in time, dates. So, I can't answer that.

Q. Okay. Was it this year, 2006?

A. It seems to me, it seems to me that it was last year, but I don't really remember. I honestly don't remember.

Q. Now, after that conversation, who else have you talked to about being an expert in this case and about this case?

A. I've talked to, with Shane here and I've talked with some folks at the FEC.

Q. Have you discussed with them the substance * * *.

* * * * *

[11] not going to try to quote them because my memory is not that good, but the issue essentially is whether that type of ad, which some would call an issue ad and others would call a campaign ad, was appropriate in the midst of a campaign.

Q. You used two terms, "issue ad" and "campaign ad." Would you tell me how you—what you understand those to describe and how you distinguish between the two.

A. What I said was that some people call it an issue ad and some people call it a campaign ad. My view is that anything that is run in the midst of the campaign that is likely to have a political impact is a campaign aid. I don't mean that as a legal term, I just mean as a practical term. I think it is possible for a campaign ad by my definitions, campaign ad and an issue ad to be the same thing. It's possible to talk about issues in a campaign and try to have some impact on issues in the midst of a campaign. I won't try to define how other people see an issue ad.

Q. Right.

[12]

A. But my sense is an issue ad is something that is hopefully going to have an impact on issues. My point is, issue ads and campaign ads can be the same thing. I mean, an issue ad run in a campaign is a campaign ad.

Q. Okay. Again let me paraphrase you and tell me if I'm right or not. I think what you said was if you run an ad about a political issue, that it will have an effect, that it will have an effect on an election and should be considered to be a campaign ad. Is that what you are saying?

MR. HAJJAR: Objection, mischaracterizes the witness's testimony.

BY MR. BOPP:

Q. Go right ahead.

MR. HAJJAR: You can answer.

A. I don't understand the process here, when they object I'm—I know I'm supposed to be quiet but—

BY MR. BOPP:

Q. Right, during their—

THE WITNESS: Is there somebody who rules * * *.

* * * * *

[14]

THE WITNESS: And could I hear the objection, please.

(The record was read aloud as follows: "Objection, mischaracterizes the witness's testimony.")

A. Let me state it in my own words.

BY MR. BOPP:

Q. Please, that's what I asked you to do.

A. Anything—I'm not talking in legal terms now.

Q. Mm-hmm.

A. Anything that happens in the course of a campaign is, potentially has some impact on the campaign so that any ad run that relates to candidates or the issues in a campaign is going to have some impact on the campaign. It may have a little impact. It may have a big impact, but it's going to have some impact, and so in that sense any ad that is run that has impact on a campaign is, in my mind, a campaign ad. That's what I mean by the term "campaign ad" because it's going to have some impact on the campaign.

[15]

Q. And that would include ads that mention the names of the candidates and ads that do not mention the names of candidates?

A. Yes, from my standpoint. Again, not a legal term, it's just bound to have some impact on the campaign and it's campaign ad from my perspective.

Q. And you used the phrase prior, in a prior answer, "a political issue." What did you mean by "a political issue"? If the ad referred to a political issue, what did you mean by that?

A. Any issue that is related in any way to the offices that are on the ballot or the candidates that are on the ballot.

Q. You've referred to your declaration that you submitted in the McConnell case.

(Plaintiff's Deposition Exhibit Number 1 was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as Exhibit 1. Now, to explain the format, this, I got this out of the joint appendix or some other [16] compilation of evidence that was submitted as part of the briefing in the Supreme Court because I could not locate your declaration that you signed, but would you examine this and tell me whether or not this is the text of the declaration that you submitted in the McConnell case?

MR. STANSBURY: Just so the record is clear, and I think you alluded to this, but the declaration that Mr. Bailey has is not signed.

MR. BOPP: What do you mean? This one? Exhibit 1?

MR. STANSBURY: Yeah, that this copy is not signed.

A. Since it isn't signed, I'm perfectly happy to read it from top to bottom. To tell you the truth—

BY MR. BOPP:

Q. If that's necessary then, please do.

A. To tell you the truth, I won't remember it exactly every word, but I will read it to see whether I agree with what I said then and assume that it is right. Let me take the time to read it.

[17]

(Witness reviews document.)

A. This certainly appears to be similar. I can't swear to it word-for-word, but it seems right.

BY MR. BOPP:

Q. Okay. Thank you.

Now, do you recall that this case, Wisconsin Right to Life versus Federal Election Commission, was before the U.S. Supreme Court previously?

A. I am here in relation to my experience in politics. I don't know this case. I don't know—I'm not here as a lawyer. I don't understand the legal history and I haven't spent a lot of time trying to figure out the legal history.

Q. Before you were contacted to do your declaration for this case, were you involved in the Wisconsin case?

A. Not to my knowledge.

(Plaintiff's Deposition Exhibit Number 2 was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as * * *.

* * * * *

[19] me, if it's necessary to correct the record on that, I'm happy to do so.

Q. Is Exhibit 2 a copy of that brief?

A. Well, once again, I'm going to presume that it is. I wouldn't know of any reason why you wouldn't give me what I actually provided so I would presume that it is. Without reading it, and even if I read it, I wouldn't necessarily remember every paragraph and word.

Q. Who contacted you about submitting a brief in the U.S. Supreme Court such as Exhibit 2?

A. I think I've answered that question. Fred Wertheimer talked to me as to whether I would be willing to participate in this case, in a continuation, in essence, of my participation in the McConnell case, which is the way I view it.

Q. Randall Dryer is listed as counsel, your counsel. Do you know him?

A. I know him on the phone.

Q. Okay. You talked to him

A. Yes.

Q. Okay. What did you pay him for the filing * * *.

* * * * *

[29]

A. Page 2, got you.

Q. Your declaration. At Paragraph 3 it says: "I also have extensive experience consulting with various citizens' initiatives and other grassroots issue campaigns. For example, I've advised, among others, Handgun Control, Inc., Floridians Against Casinos, and League of Conservation Voters."

Let's start, I guess, with Handgun Control. When did you represent them or consult with them?

A. I consulted with them on a pro bono basis virtually from the inception of the organization—now you are really testing my memory—in the '70s.

Q. And through what period of time?

A. Through much of the '80s and even into the early '90s and an occasional meeting since then, but it wasn't a contractual arrangement, so they would call me occasionally to seek guidance and thoughts and so forth.

Q. And what kind of subjects would they consult with you?

A. General strategy on the issue how to [30] communicate the issue to the public at large, how to seek public support for their positions. General strategic advice and occasionally in terms of some advertising, advertising for the issue, to shape public opinion as opposed to having impact on campaigns.

Q. Were there occasions when they were involved in grassroots lobbying that you consulted with them?

A. If by grassroots lobbying you mean reaching the public, to reach the public officials in some way, the answer is no. In a more broad sense, again, I'm not using legal definitions, I'm just using my own part of the communications effort of any such organization, has some grassroots lobbying, my term, grassroots lobbying impact if you are trying to build the membership, if you are trying to build the understanding of the issue among the public without necessarily causing them to take any specific actions.

Q. Well, let's use your definition of grassroots lobbying, which is—and again, I'm [31] paraphrasing, and you put it in your own words if I'm inaccurate, the—where there are public communications by the group to the general public with a message to, urging them to contact appropriate governmental officials to take certain action such as vote for a bill or vote against a bill?

A. Did you describe that as my definition?

Q. That's what I just understood you to say as your definition. If I'm not correct, would you give it to me.

A. That is not correct.

Q. What I was saying is that in my term, you could call grassroots lobbying the building of an organization of supporters who subsequently might be asked to contact, but the building of that grassroots organization is another form of grassroots lobbying. In my mind, they are sort of part and parcel of the same thing in the sense that if you don't build the organization, then you have no organization to call on. My recommendations and [32] consulting for the group related to how do you build the organization, how do you grow the members.

Q. Well, let's come up with a word, so that we'll understand each other, for this specific kinds of advertising that are public communications to the general public, or portions of it, and then are asking them to contact governmental officials such as legislators to vote for or against a particular bill or to take some public action. What do you want to call that, that kind of advertising?

A. Let's call it public lobbying advertising.

Q. Okay. Good. So your recollection is that you did not consult with Handgun Control, Inc. about public lobbying advertising. Is that right?

A. That's correct, I don't remember any conversations about that, although it was always sort of implied that, at times, the organization was going to do that. But I didn't participate in developing those ads or in recommending them.

Q. Did they engage in that sort of advertising, that is, public lobbying advertising?

A. I'm trying to think of cases. Frankly I [33] suspect that they did, but I don't remember. There were undoubtedly particular instances where there were bills before the Congress where they did some of that. I was not involved in it.

Q. Now, with respect to Floridians Against Casinos, what was your consulting with that group, what was the nature—

A. That's really a different kind of issue altogether, where there was a ballot issue on the ballot in Florida to permit casino gambling, and so there was a campaign waged for or against, in our case against that ballot issue. It's a different kind of thing altogether. It didn't involve legislature in any way.

Q. The League of Conservation Voters, what was your relationship with them or what did you consult with them on?

A. That, again, was a personal pro bono relationship because a friend was the head of the organization and he sought my views on a variety of issues. More in the first

category, more in the handgun control category, where how do you broaden [34] the membership of the organization, what are the issues, what's the phraseology that can expand the membership. I don't remember any instance where I was involved in advising them or working with them on any, on any advertising for them.

Q. Okay. Have you consulted with any group specifically on public lobbying advertising or any person?

MR. HAJJAR: Objection, compound.

THE WITNESS: I'm sorry.

MR. HAJJAR: I objected that there are actually two questions to this question. If you understand it, you can answer.

A. Now I don't even remember it. I'm sorry.

MR. BOPP: Would you repeat it, please.

(The record was read aloud as follows: "QUESTION: Have you consulted with any group specifically on public lobbying advertising or any person?")

A. I think the answer to that is no. I'm just trying to, I'm trying to recall any instance when we ever did any public—what was the phrase?

[35]

BY MR. BOPP:

Q. Public lobbying advertising.

A. Public lobbying advertising. No, by my definition, I did a good deal of grassroots organization-building

kind of work and some advertising of that sort, not public issue—

Q. Public lobbying advertising?

A. Public lobbying. I'm going to write it down.

Q. I had to. When is public lobbying advertising customarily done?

A. For the most part, I think it happens when a bill or a matter or an issue is directly before the Congress and it tends to be when votes are scheduled so that the week before it varies, but that's my—it's not my experience in the sense of having done it, but that's clearly when it happens.

Q. Okay. Now, does such advertising customarily mention the names of particular office holders that they are being—that the public is being asked to lobby?

A. In some instances it does. Often it does [36] not. I think increasingly it does. It's targeted in particular districts or particular states.

Q. And why would they, such advertising mention the names of specific office holders?

A. Well, if it's in advance of an issue, generally, it's because that office holder is either undecided on the issue or it is taking on a position and you want the public to weigh in with them to cause them to take the other issue.

Q. Now, turn to page 6 of your report—your declaration, I'm sorry—Paragraph 15. You mention that your work in Florida regarding Floridians against gambling involved a ballot measure?

A. Right.

Q. Okay. And so there would be no necessity or even no reason to mention candidates or office holders in that context. Is that right?

A. In that campaign, absolutely no reason at all.

(Plaintiff's Deposition Exhibit Number 4 was marked for identification.)

[37]

BY MR. BOPP:

Q. Let me show you what's been marked as Exhibit 4. And let me describe the exhibit for you. The lower right-hand corner there is an identification—well, these are six—it's the story books for six ads. Do you know what a story book for an ad is?

A. Storyboard.

Q. Storyboard. See, you know better than me. Storyboard for an ad, do you know what that is?

A. Yeah.

Q. And this has in the lower right-hand corner identification of each ad that we have GIA Number 1, then GIA Number 2, GIA Number 3, now, GIA Number 4, as you can see, has 15 storyboards on one page. And the next page is a transcription of the words under each storyboard because of the difficulty even though not impossibility of reading the thing. So that is identified as GIA Number 4 script. Then we have GIA Number 5 and GIA Number 6. And GIA Number 6, there are two pages. The first page has nine storyboards for that ad

and the second [38] page, 2 of 2, has the final five. Right?

A. Mm-hmm.

Q. Now, for the record, these are the ads that are contained in Appendix J of the expert witness report of Goldstein in the McConnell litigation. So I would like for you to review this exhibit, read the text under each one of these storyboards so that you will get a sense of what is said in these various ads as reflected in this exhibit.

A. Okay.

(Witness reviews document.)

A. Okay.

BY MR. BOPP:

Q. Now, I'd like to show you what's been marked as Exhibit 5.

(Plaintiff's Deposition Exhibit Number 5 was marked for identification.)

BY MR. BOPP:

Q. Exhibit 6.

(Plaintiff's Deposition Exhibit Number 6 was marked for identification.)

[39]

BY MR. BOPP:

Q. And Exhibit 7.

(Plaintiff's Deposition Exhibit Number 7 was marked for identification.)

BY MR. BOPP:

Q. And I'd like for you to review those as well.

(Witness reviews documents.)

A. Yes, sir.

BY MR. BOPP:

Q. I want you to assume as to all of these ads, there's nine ads total here, that they were to be broadcast within 30 days of a primary or 60 days after general election?

A. First, with respect to Exhibit 4, do you have an opinion on whether those ads would influence an election?

A. They are all campaign ads. My definition, again, of campaign ads is something inevitably going to have some impact, maybe a little, maybe a lot, on an election that is in process, sure.

[40]

Q. All right. Now I want to compare the ads in Exhibit 4 and the ads, the three ads, Exhibit 5, 6 and 7, and is there any material difference in the message or how the message is conveyed between the ads in Exhibit 4 and the ads, Exhibit 5, 6 and 7 in your opinion?

MR. HAJJAR: Objection, vague.

THE WITNESS: I'm sorry.

MR. HAJJAR: I objected that I thought the question was vague. Once again, if you can answer the question, go ahead.

A. Yes, I think there's a difference. And my answer might surprise you in the sense that I think 5, 6 and 7 are probably more effective campaign ads.

BY MR. BOPP:

Q. In what way?

A. Because they are not so obvious, even though to anybody experienced with the business, it's reasonably obvious what the intent is. The point is that most of the ads in Exhibit 4 are sort of sledgehammer. And Exhibits 5, 6 and 7 are a little more subtle. But obviously they are campaign [41] ads.

BY MR. BOPP:

Q. Now, let's turn to Exhibit, in Exhibit 4, let's turn to the last ad GIA Number 6.

A. Yes.

Q. Are there any material differnece in content and specific—yeah, any material differences in content in your opinion between that ad and, let's say, Exhbit 5?

MR. HAJJAR: I just want to note for the record that page 1 of 2 on GIA Number 76 storyboards themselves are very grainy and very difficult to make out the images.

MR. BOPP: Okay. You are aware this will be attached to the deposition?

MR. HAJJAR: Yes.

MR. BOPP: Okay.

A. Let me make a general point. It may be a professional occupational hazard that I'm going to express, but television is called television because of the vision side of it. So among other things, on some of these ads you can't even see from the [42] storyboard what the pictures area. And in terms of Exhibit 5 there, is, in fact, no storyboard, so . . .

One of the interesting things about television advertising is that the pictures are often even more powerful than the words, but nonetheless you are here asking, I think, to focus on the words.

BY MR. BOPP:

Q. Yes.

A. I think there's a difference between the two ads. It's the same difference that I expressed before. One is a little more subtle and, therefore, probably more effective in that it does not categorically state with a sledgehammer what the position of the public officials are, but there isn't any question that during the period of a campaign, it is a campaign ad and would perhaps have more impact than the other one.

Q. Now, you referred to one difference, I think.

A. Right.

Q. GIA Number 6 does state the position of [43] the two senators being referenced in the ad on the matter, that is, it says: "Your senators, Russ Feingold and Herb Kohl, voted to continue this grizzly procedure." And there's no similar statement in Exhbiit 5, the position of senators Feingold and Kohl, on the filibuster. Right?

A. That's correct, but I'm going to add that the importance of understanding what a campaign ad is, my term, not a legal term, is that an ad run in the midst of a campaign has an impact. Senator Feingold is one of the two candidates, one of the two people mentioned that's on the ballot and the other one is not. Then the impact of running the ad in the midst of the campaign, implying, as this ad does, what their position is, has enormous—could have, could have, it might have no impact, but could have substantial impact on the election itself.

Q. When you are saying "implying their position," you are referring to Exhibit 5?

A. Yes.

Q. Okay. Now, isn't it true that groups often do public lobbying advertising—one [44] circumstance when a group might do or individuals might do public lobbying advertising is when the position of the office holder is undecided?

A. Correct.

Q. Okay. So isn't this ad consistent also with the proposition that these two senators' positions might be, or one or more of them, might be undecided?

A. But it's presented by an organization which is, which has already stated its opposition to Senator Feingold's opposition to this, so of course not.

Q. Is that said in this ad?

A. No, neither is the phone number. I mean, this is a campaign ad, Mr. Bopp. It is obvious it is a campaign ad.

Q. But you don't mind if I ask you details about it, do you?

A. Both in terms of its timing, its content and it's obvious intent.

Q. Now, would you answer my question.

A. Sure.

[45]

Q. My question was isn't it also true that the way, that what is said in this ad is perfectly consistent with the proposition that the position of one or more of the senators might have been undecided?

A. But is wasn't.

Q. Isn't the ad, the text of the ad consistent with the proposition that the position might be undecided?

A. I'm sorry, I can't—I really can't answer that question. I'm a—my business is politics. I look at an ad and I think I understand the ad. This is a campaign ad.

Q. Do you have a problem with reading the text of the ad?

A. When I read the text of the ad?

Q. Do you have a problem with your ability to read the text of the ad?

A. No, I don't.

Q. Do you have a problem with your ability to understand what the ad says?

A. Not in the slightest.

[46]

Q. Okay. So I'm asking you about your own testimony. Your own testimony was that public lobbying advertising is done in some instances when the person being lobbied, their position is undecided?

A. What has that got to do with this?

Q. So my question is: Isn't—there's, A nothing in the text of the ad that says vote for, vote against these candidates. Right?

A. Yes, there is.

Q. Okay. Where is that? What words are those?

A. Those words are the entire ad. That's what the ad says. That's why the ad is being run.

Q. Is this just simply a mind-reading episode by your? Are you psychic?

MR. HAJJAR: Objection, argumentative.

A. No, but, you know, experience has some value perhaps, both in the law and in the advertising world. And when this ad is run in the campaign by an organization that has already criticized these senators for taking a position that [47] they've taken, then it's a campaign ad. Of course it's a campaign ad. I mean, I don't understand even what the argument is.

BY MR. BOPP:

Q. Is Exhibit GIA number 6 found on Exhibit 4?

A. I'm sorry.

Q. Yeah.

A. Yeah.

Q. Is that a public lobbying advertising—advertisement, the way you have defined it?

A. The way I have defined it, I think clearly is is.

Q. With respect to Exhibit Number 5, is that ad a public lobbying advertisement by your definition, Exhibit Number 5?

A. Yes, and, remember, please, that my definition is not a legal definition. And a public lobbying advertisement can be a campaign ad.

Q. With respect to Exhibit 6?

A. Sorry, got you.

Q. Is that radio ad a public lobbying [48] advertisement as you have defined it?

A. Yes, I think so.

Q. With respect to Number 7, is that a public lobbying advertisement as you have defined it?

A. Yes, I think so. Wait a minute. Let me read it. I'm answering too quickly.

Q. Sure, please do.

A. Yes.

Q. Now, you've also stated that public lobbying advertisements are run when a particular office holder has a position on an issue or a bill, and the attempt is to persuade them to change that position. Is that right?

A. Sure.

Q. Is that kind of effort successful?

MR. STANSBURY: Objection, vague.

A. It can be. Generally, frankly, it's not, but it can be.

(Plaintiff's Deposition Exhibit Number 8 was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as [49] Exhibit 8. Would you review that, please.

(Witness reviews document.)

A. Okay.

BY MR. BOPP:

Q. Now, let's assume for purposes of this hypothetical that Bill Yellowtail is a candidate for office and that this ad with this text is to be run within 30 days of a primary or 60 days of a general election. Is this ad a public lobbying ad, advertisement, as you have defined it?

A. I wouldn't know how to describe this. If this is an ad, this is trash, so is Bill Yellowtail a member of Congress?

Q. Let's assume for the purpose of the hypothetical that, yes, Bill Yellowtail is a member of Congress.

A. Frankly, I don't see this because I don't think it's tied to anything.

Q. You don't see it as a public—

A. I see it as trash.

Q. Okay. Is it a public lobbying advertisement as you've defined it?

[50]

A. On the face of it, I wouldn't call it that, but I don't know what is relates to. It may be within the context of something that is going on in the Congress right now to which these words may apply, and in that sense it could be, but I don't see it as that because it certainly isn't very specific.

Q. Would you view this, if broadcast, as we have described, as I have posited, within 30 days of a primary or 60 days of a general election as a campaign ad as you have characterized or defined it?

A. Well, of course, it's a campaign ad.

Q. Now, I want you to—

A. I want to remind both of us that public lobbying advertising can be public lobbying advertising by my definition, but if run within a campaign period, it is a campaign ad. We do understand that I'm not drawing a distinction between the two. A public advertising, public lobbying ad run in a campaign period is a campaign ad.

Q. Now, I want you to pull out Exhibit 5 [51] again.

A. Okay.

A. Are there any distinctions in your view between the text of Exhibit 5 and the text of Exhibit 8, are there any differences in the content and how the candidate and issues are presented?

A. Sure.

Q. And what are those?

A. Exhibit 8 is trash and Exhibit C is a little more specific and very much more subtle and probably more effective.

Q. So can you—could you specify the differences in the content that leads you to those conclusions?

A. Both are, in my mind, campaign ads and the Yellowtail, let's call it Exhibit 8, the Yellowtail ad is so over the top that it is not likely, without knowing more about the context, it's not likely to be effective. People would sort of grimace and walk away.

Exhibit 5 is not off-putting. It is subtle. Implies the position of the candidates or [52] of the candidate, and is, therefore, more likely to be effective communications, campaign communications.

Q. Now, isn't it true that Exhibit 5 references a specific legislative matter, where Exhibit—that is going to occur in the future, where Exhibit 8 does not?

A. Exhibit 8 certainly doesn't, and Exhibit 5 references something that has happened in the past and might happen in the future. Yes, it is more specific.

Q. Now, with respect to reference to the candidate involved, isn't it true that Exhibit 5 only references a clearly identified federal candidate with a statement urging the public to contact the candidate and to ask that he take a particular position on a legislative matter, where Exhibit 8 has many more references with respect to the character and integrity of the candidate?

A. Yeah, I think that Exhibit 5 is a more effective campaign ad.

Q. Well, but if you could answer my question [53] specifically.

A. Part of my problem is that I don't know who Bill Yellowtail is, I don't know the content of this and so forth. It doesn't make a whole lot of sense to me, but ask the question again, I'll try to answer it.

MR. BOPP: Would you repeat the question, please.

> (The record was read aloud as follows: QUESTION: Now, with respect to reference to the candidate involved, isn't it true that Exhibit 5 only references a clearly identified federal candidate with a statement urging the public to contact the candidate and to ask that he take a particular position on a legislative matter, where Exhibit 8 has many more references with respect to the character and integrity of the candidate?")

A. Well, in fact Exhibit 5 does not identify either of the people mentioned as a candidate, so I'm not sure I do agree with your question. But let [54] me say it in my own words. Clearly Exhibit 5 is more specific, is more precise, is less flamboyant, and relates to a more specific issue.

BY MR. BOPP:

Q. Isn't it true that Exhibit 5 contains no reference to the candidate here. Feingold, character, qualifications or fitness for office, where Exhibit 8 does?

A. That's correct.

Q. Isn't it true that Exhibit 5 contains no words that promoted, supported, attacked or opposed the candidate, Feingold, where Exhibit 8 does.

MR. HAJJAR: Objection, calls for a legal conclusion.

A. I think that's generally correct.

(Plaintiff's Deposition Exhibit Number 9 was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as Exhibit 9. Now, would you review the text of this radio ad, please.

(Witness reviews document.)

[55]

A. Yes.

BY MR. BOPP:

Q. Does this ad, Exhibit 9, qualify as a public lobbying advertisement in accordance with your definition?

A. I think it does.

Q. If we posit that, assume as part of the hypothetical that this ad were to run, be run within 30 days of a primary or 60 days of a general election and that in this case Senator Kohl was a candidate for reelection and, therefore, we have a reference to a candidate. Would this be a campaign ad in accordance with your definition?

A. Yes, I think it would.

Q. And why is that?

A. I think ads that raise issues in relation to candidates, regardless of which side of the issue, they raise issues in relation to candidates are putting in the minds of voters, candidates and issues which potentially has an impact on elections, so it becomes a campaign ad.

Q. Now, you mentioned in your testimony that [56] you believe that Senators Kohl and Feingold were supporting the filibuster and, therefore, would be opposing ending the filibuster. Is that your testimony?

A. Well, it's my understanding from the Wisconsin Right to Life web site that they were opposing the filibuster.

Q. Now, after the running of Exhibit 9, there was a vote on the Alito nomination where there was a vote to, for cloture so that there would be no filibuster. Are you aware of how Senators Feingold and Kohl voted in that instance?

A. Personally, no.

Q. Are you aware of the fact that Senator Kohl voted for cloture and against the filibuster?

A. No.

Q. And since that time in May, there was, Kavanaugh was on the floor of the senate for confirmation, Brent Kavanaugh, for the D.C. Circuit, and there was a vote for cloture in order to prevent a filibuster of that nomination. Do you know how Senators Feingold and Kohl voted then?

[57]

A. No.

Q. Are you aware of the fact that Senator Kohl voted for cloture and therefore against any filibuster in that case.

A. No.

Q. Now, if each of those--if that was true that Senator Kohl voted in the way I've described in the Alito nomination and the Kavanaugh nomination, that would reflect a change in this position as to the filibuster generally, wouldn't it?

A. I can't answer that. I don't know that that's true, but I assume it's true.

MR. BOPP: All right. I have no further questions.

MR. HAJJAR: Can we take a break?

MR. BOPP: Please do.

(Recess taken 11:34 a.m. to 11:50 a.m.)

MR. HAJJAR: We have no questions.

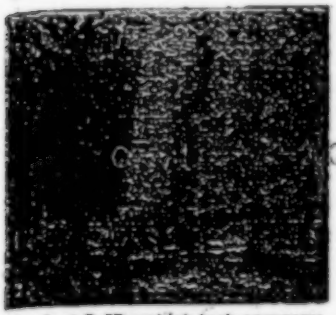
(Signature having not been waived, the deposition of DOUGLAS L. BAILEY was concluded at 11:50 a.m.)

[Exhibit 8]

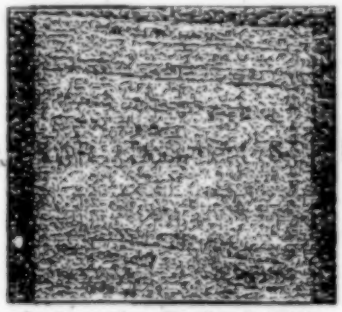
Exhibit 4 from Deposition of Douglas L. Bailey
Exhibit 8

[Filed: June 23, 2006]

BEST AVAILABLE COPY

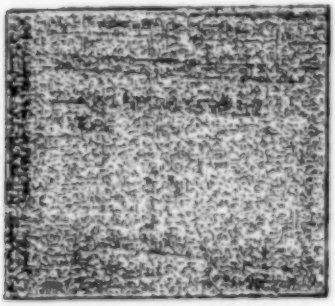


[Graduate]: "Dear high tech company, I'd like to send you my resume." [Announcer 1]: Dear Graduate, sorry, Congress is going to give your job to



a foreign worker. [Graduate]: "But I've just finished four hard years of technical studies."

[Announcer 1]: Sorry, besides foreign workers will work for a lot less. [Announcer 2]: Is this any way to



treat American workers? But based on her record, Congresswoman Northrup is likely to vote

in favor of the Foreign Worker Bill. Call Congresswoman Northrup and tell her to save

our best jobs for American workers. Ask her to vote no on the Foreign Worker Bill.

This message paid for by the Coalition for the Future American Worker.

EXHIBIT 4
Deponent
Date Rptr

GIA
II 1

160

CMR

Ad Detector

BRAND: POL-CONGRESS+

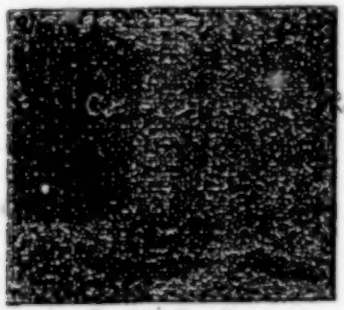
TITLE: FAIR/A Latham Foreign Worker Bill

COMMERCIAL: FAIR/A Latham Foreign Worker Bill 1 of 1

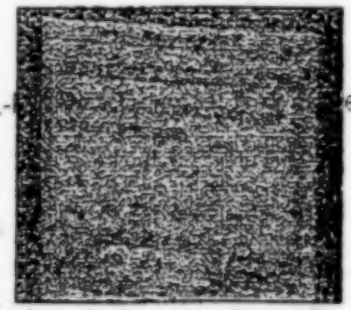
LENGTH: 30

FRAMES: 7

CMAG REPORTS

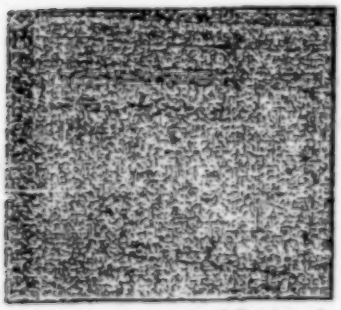


[Man1]: "Dear High Tech Company: I'd like to send you my resume." [Man2]: " Dear Graduate: Sorry, Congress is going to give your



job to a foreign worker." [Man1]: "But, I've just finished working four hard years of technical studies."

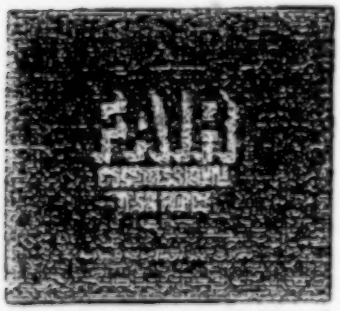
[Man2]: "Sorry, besides, foreign workers will work for a lot less." [Announcer]: Is this any way



to treat American worker? But based on his record, Congressman Tom Latham is likely

to vote in favor of the Foreign Worker bill. Call Congressman Latham and tell him to save

our best jobs for American workers. Ask him to vote no on our Foreign Worker bill.



[PFB FAIR Congressional Task Force]

CJH
4/2

CMR

Ad Detector

BRAND: POL-CONGRESS+

TITLE: UT/COC Matheson Can't Decide Rx

COMMERCIAL: UT/COC Matheson Can't Decide Rx 1 of 1

LENGTH: 30

FRAMES: 7

CMAG REPORTS

Case 1:01-cv-01260-RJL-JMR Document 76-3 Filed 08/23/2004 Page 4 of 5

[Announcer]: Jim Matheson can't decide what position to take on prescription drug coverage for seniors.

He doesn't support the common sense plan passed by the House of Representatives.

He doesn't support Bill Clinton's big government plan. Tell Jim Matheson

a big government plan is the wrong way to go. It gives seniors

no choice, and it could cause millions of seniors to lose the coverage

they already have. Tell Jim Mathson to make a decision.

This issue is too important to ignore.
[PFB: US Chamber of Commerce]

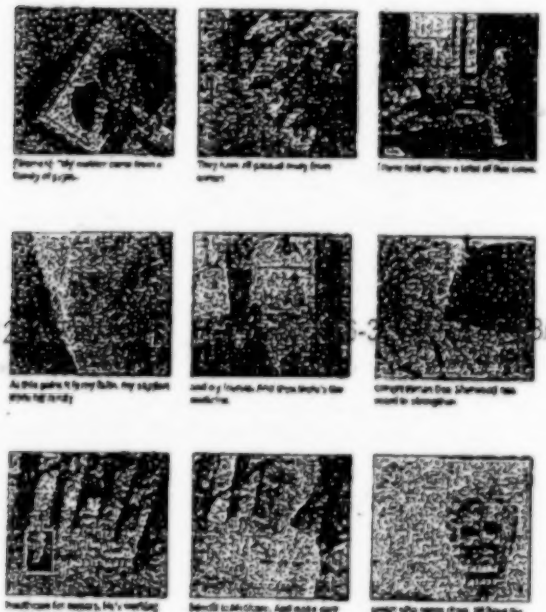
CJA
± 3

162

CMAG REPORTS

Ad Detector

BRAND: [illegible]
TITLE: [illegible]
COMMERCIAL: [illegible] 1 of 1
LENGTH: [illegible]
FRAMES: [illegible]



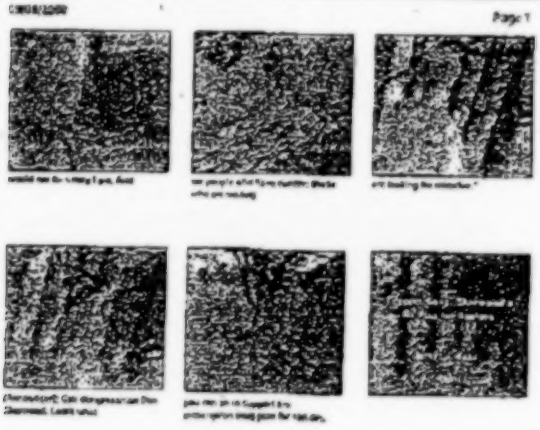
Campaign Media Analysis Group
[illegible]

CMAG REPORTS

Ad Detector

BRAND: [illegible]
TITLE: [illegible]
COMMERCIAL: [illegible] 1 of 1
LENGTH: [illegible]
FRAMES: [illegible]

[illegible] Page 1



Campaign Media Analysis Group
[illegible]

C J A
C U

Script for Citizens/Better Medicare

[Worried]: "My mother came from a family of eight They all passed away from cancer. I have had cancer five times. At this point, it is my faith, my support from family and friends. And then there's the medicare [*sic*].

Congressman Don Sherwood has voted to strengthen healthcare for seniors. He's working to add prescription drug benefit to Medicare. And make sure medicines are available for every senior who needs them. Without the medicine, I would not be where I am. And we people who have cancer, those who are waiting are looking for miracles."

[Announcer]: Call Congressman Don Sherwood. Learn what you can do to support his prescription drug plan for seniors.

[GIA #4 Script]

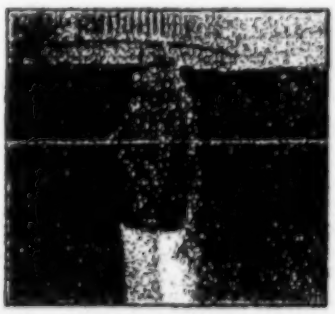
COPYRIGHT ©R

[Woman 1]: "Like a lot of people I admire Jim Langevin, but when it comes to the issues that we

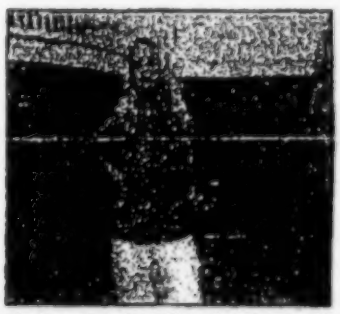
care about he just doesn't understand." [Woman 2]: "His record is clear,

Jim Langevin voted to end a woman's right to choose and now

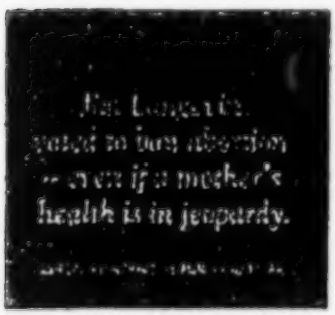
he's trying to confuse the issue and trying to confuse us." [Woman 3]: "Our health and



privacy are at risk and they're too important for us to be anything but sure.



Jim Langevin isn't listening to us and he sure isn't leading."



[Woman 2]: "Call Jim Langevin, tell him he can't take away our rights."

{PFB: Rhode Island Women Voters}

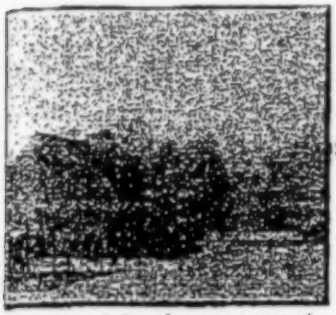
GTA #5

CMR

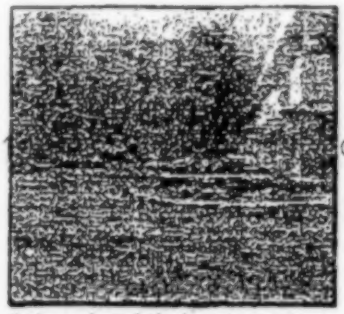
Ad Detector

BRAND:	NATIONAL PRO LIFE ALNC+
TITLE:	WI/NPLA Feingold Kohl Abortion 60
COMMERCIAL:	WI/NPLA Feingold Kohl Abortion 60 1 of 1
LENGTH:	60
FRAMES:	14

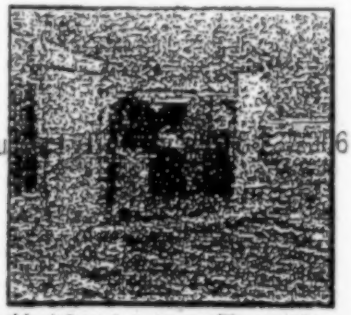
CMAG REPORTS



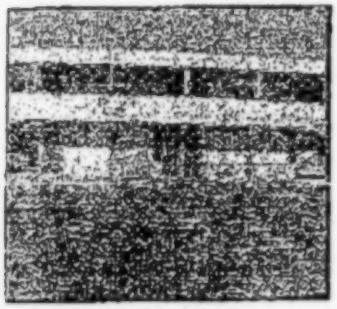
[Announcer]: America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and exposed of



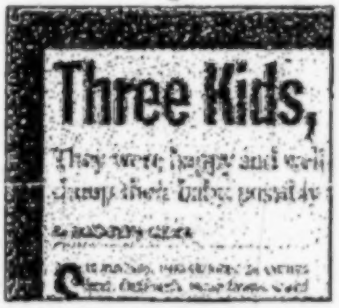
their newborn baby in a dumpster. Most Americans couldn't believe that



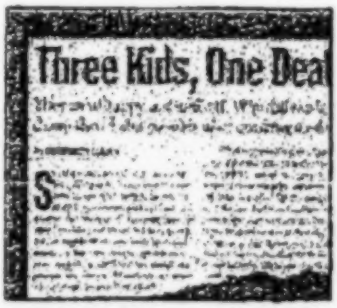
this defenseless human life could be so coldly snuffed out. But incredibly, if a doctor



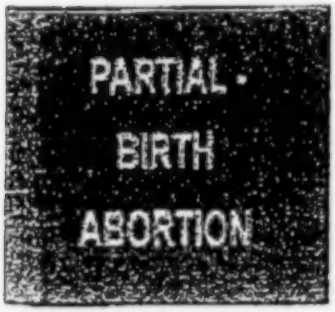
had been present that day in Delaware and delivered the infant, all but one inch from full



birth and then killed him it would have been perfectly legal.



Instead of murder or manslaughter, it would have been called a partial-birth abortion.



Killing late in the third trimester, killing just inches away

from full birth. Partial-birth abortion puts a violent death on thousands of babies

every year. Your Senators, Russ Feingold and Herb Kohl

Campaign Media Analysis Group
703-683-7110
www.politicsontv.com

G/A
#C
1 of 2

CMR

Ad Detector

BRAND:	NATIONAL PRO LIFE ALNC+	
TITLE:	WI/NPLA Feingold Kohl Abortion 60	
COMMERCIAL:	WI/NPLA Feingold Kohl Abortion 60	1 of 1
LENGTH:	60	
FRAMES:	14	

CMAG REPORTS

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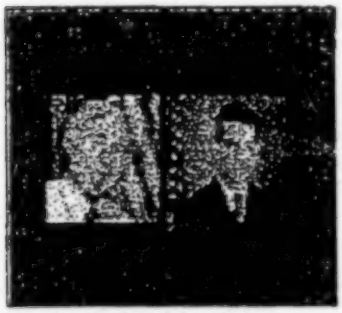

voted to continue this grizzly procedure. Contact Senators

Feingold and Kohl today and insist they change their vote and oppose

partial birth abortion. Their number in Washington is 202-224-3121.

[PFB: Members of the National Pro-Life Alliance]

GJH
HL
2 of 2

[Exhibit 14]

Transcript of Deposition of
Charles H. Franklin, III
Exhibit 14

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. :1:04cv01260

WISCONSIN RIGHT TO LIFE, INC., PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

AND

SEN. JOHN MCCAIN, ET AL.,
INTERVENING DEFENDANTS

DEPOSITION OF CHARLES H. FRANKLIN, III, PH.D.

Monday, June 5, 2006
[Filed: June 23, 2006]

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* * * * *

[7]

* * * * *

BY MR. BOPP:

Q. State your full name, please.

A. Charles Hicks Franklin, III.

Q. And with whom are you employed?

A. The University of Wisconsin.

Q. And in what capacity?

A. I'm a professor of political science.

Q. This deposition is being taken by agreement, and thank you for agreeing to come to D.C. and accommodating all the lawyers here. And you've been designated as an expert witness in Wisconsin Right to Life versus Federal Election Commission. Are you aware of that?

A. Yes.

Q. Now, the designation specifies that your anticipated subject matter testimony is as follows:

It is currently anticipated that Professor Franklin's testimony will generally address the [8] following subjects: 1, the impact of the broadcast advertisements identifying candidates on campaigns for elective office; 2, the alleged need to identify office holders and grassroots lobbying advertising; 3, an overview of the 2004 Wisconsin Senate campaigns including the role of the judicial filibuster issue; 4, the likely impact of Wisconsin Right to Life's proposed advertisements had they been run in the 2004 Wisconsin pre-election environment; 5, the effect that aggressors' lobbying exception like the one Wisconsin Right to Life seeks would likely have in future electoral contests; and 6, any other relevant matters relating to advertising and election.

Then the final statement in the notice is defendants reserve the right to alter the subjects of Professor Franklin's testimony relevant to the matters raised in this case.

Now, at this point in time are those six subjects that have been—that were specified, are those—is that the extent the subject matter of your expert testimony you expect to give? And if * * *.

* * * * *

[22] 225. What is the—do you know how many hours you've spent so far on this project?

A. I haven't totalled it up yet.

Q. Approximately?

A. It's somewhere in the order of a hundred hours.

(Plaintiff's Deposition Exhibit Number 1 was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as Plaintiff's Exhibit 1 and ask you if you can identify that?

A. This is the report I submitted to the FEC.

Q. Is this your final report?

A. Yes, it is.

Q. And do you anticipate preparing any further reports?

A. I do not.

(Plaintiff's Deposition Exhibit Number 2 was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as * * *.

* * * * *

[25]

(Witness reviews document.)

A. Yes. This appears to be the packet of what I called unlabelled information that was sent to me by the FEC.

BY MR. BOPP:

Q. Okay. Now, included in this are newspaper articles, and you cite newspaper articles in your report. Correct?

A. That's correct.

Q. Is it customary and appropriate for experts in your field to rely upon newspaper reports of items?

A. Yes.

Q. Why is that?

A. Because in talking about political matters, the public discussion of those things are the things that most citizens and most non-insiders are exposed to.

Q. In your report you appear to credit the truthfulness of reports that are, you cite from newspaper articles. Is that customary and appropriate within your area of specialty?

[26]

A. Yes, within limits.

Q. And what are those limits?

A. Reports of the dates at which things happened, at least a press conference being held, for example, and in general statements that were made in public forums that are quoted, I think,would be routinely accepted. Matters of more opinion or interpretation, I think, in my field would be viewed as just that, so an editorial would not be given credit, credence as a factual statement.

Q. But a news report would?

A. Again, within these limits.

Q. Okay. Now, going back to the advertising that you consulted of the two groups for and against the filibuster issue that we referred to previously, the $5 million and 3.5 approximately, and you mentioned you looked at those, the text of some or whatever of the ads. What period of time is it your recollection that those, that advertisement was being run?

A. I believe they started in late March and * * *.

* * * * *

[28]

A. With the understanding that I can't quote it directly.

Q. Right.

A. My summary would be on the pro-filibuster side was the argument that the Democrats should have the right to block judges they considered too radical, too extreme, and also connected with that, that the minority in Congress should have some ability to prevent a majority from always having its way. On the antifilibuster side, the argument primarily was simple fairness

requires an up or down vote and that by blocking the President's highly qualified nominees, the Democrats were standing in the way of judicial positions that needed to be filled and that simple fairness demanded be filled.

Q. Were these ads designed to affect or influence the vote in the Senate on the filibuster issue in your opinion?

A. Some of them clearly were, some may have been more aimed at public opinion generally, but I think it would be fair to say that at least a significant number of them were aimed at that.

Q. And those that were directed or aimed at influencing the vote, what characteristics did they have that made you conclude that they were directed at that purpose?

A. They mentioned a specific senator by name, pointed to his role or her role in the debate. At least according to National Journal, they were also at broadcasts primarily in the States where those senators were from.

Q. What were the characteristics of the ads that you viewed their purpose to be to affect the general issue?

MR. DEELEY: Objection, mischaracterized the testimony.

BY MR. BOPP:

Q. Would you characterize it if I've rephrased it in a way that's inaccurate. The second group that you identified.

A. There were ads that said the nominees deserve an up or down vote. I'm sorry, I don't recall whether they also said this is hurting the * * *.

* * * * *

[31] them. The second page affecting the general issue.

A. The ones that did not—

Q. Okay. What would you like to call those, the second group? You can say B.

A. Shall we call them the ads that did not mention an office holder?

Q. Okay.

A. And now I'm going to have to ask you to repeat the question.

Q. Sure. With respect to the ads that did not mention an office holder, would you characterize, correct me if I'm wrong at any time, were to influence the issue generally, is that sort of advertising helpful in, when you are trying to influence votes in Congress?

A. It can be.

Q. When can it be and when wouldn't it be?

A. Those advertisements should be expected to raise the salience of the issue among the public and possibly to change or shift public opinion on that issue. And so to that extent, simply raising public concern and awareness of an issue could have the [32] effect of also influencing those who pay attention to public opinion, so, yes, in that sense they could.

Q. In what respect would they not be helpful in attempting to influence votes in Congress?

MR. DEELEY: Objection, assumes facts not in evidence.

BY MR. BOPP:

Q. You said they can be. So I assume that there's some aspect of this.

A. To the extent that they do not directly identify or point to an elected official and ask that citizens contact that official, it would be reasonable to assume that they have less direct lobbying or effect by contacting than if they simply discussed the issue and take a position on the issue.

* * * * *

Q. Now, some would characterize this, the activity you've just described between these two groups advertising on the filibuster issue, as grassroots lobbying efforts. Are you familiar with that phrase?

* * * * *

[34] categories.

Q. Let's explore that for a minute. You are familiar with the phrase "issue advertising"?

A. Yes.

Q. Now, how would you define that?

A. This is where the vagueness comes in, of course. An issue advertisement, in the broad sense that I use the term, and intended in the report as well, is any

advertising by a group, usually not a candidate or a political party, but which discusses an issue, usually takes a position on the issue, and may or may not imply something or say something about candidates or office holders' positions on that issue. So when I use the term "issue advertising," I mean it in that relatively broad sense. And it's in that sense that these things that we could also call grassroots lobbying are, in my broader terminology, equally well thought of as issue ads.

Q. Would it also be true that the phrase as you define it of "issue advocacy" is broader than [35] what you understand grassroots lobbying to be?

A. To the extent that a grassroots lobbying only implies a connection to a particular office holder, then I think that would be a definitional distinction between the two.

Q. Is it fair to say that grassroots lobbying is, based on your definitions, a subcategory of issue advocacy—or issue ads?

A. Yes, in the sense that I'm using it here and in the report, I think of them as closely linked and that grassroots lobbying, again, for the most part, would be a subcategory of issue ads.

Q. When you are researching the filibuster issue and you found these two campaigns being conducted by these groups on the filibuster issue that we've just been talking about, are you familiar with other groups doing grassroots lobbying on issues about upcoming votes in Congress?

A. Yes.

Q. And when you say you are familiar, what do you mean by that?

A. I mean that I'm aware that such things [36] happen. I have not done a scholarly investigation of such things myself, so I don't have detailed expert knowledge of specific campaigns of that sort.

(Plaintiff's Deposition Exhibit Number was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as Exhibit 4. And would you review that document which, I believe, defines various terms associated with lobbying and other forms of advocacy.

(Witness reviews document.)

MR. DEELEY: I object to the document to the extent it's, a margin is cut off.

A. Okay.

BY MR. BOPP:

Q. Now, I'll refer you to page 2 of the exhibit at the bottom, and there's the heading: Grassroots Lobbying. And then it says: Key indicators of grassroots lobbying. And there's three bullets points: Relates to specific legislation, reflects a point of view on the legislation's merits, encourage general public to * * *.

* * * * *

[39]

Q. Now, are you—is grassroots lobbying, at least on occasion, tied to upcoming votes in Congress?

A. Yes.

Q. Now, are you familiar with the fact that Congress is often in session in the fall of election years including within 60 days of an election?

A. Yes.

Q. And are you familiar with grassroots lobbying campaigns having been conducted during that period of time to influence an upcoming vote in Congress?

A. I'm not specifically familiar with that.

Q. Would you be surprised or would that be incompatible with your experience that such campaigns would be conducted in that time period?

* * * * *

A. In the past, before these issues before us came up, it certainly is plausible that it would have happened, and I simply don't know of specific cases.

(Plaintiff's Deposition Exhibit Number 5 * * *.

* * * * *

[42] to take action through the identification of this legislator, but that's my reading of the words here.

BY MR. BOPP:

Q. Do you agree with that statement, not from a legal standpoint but from an ad design standpoint?

MR. O'NEIL: Same objections.

A. I really don't know.

BY MR. BOPP:

Q. Do you agree with that statement as it relates to how grassroots lobbying is conducted?

MR. DEELEY: Same objections.

A. To the extent that this communication that, identifies the position of a legislator, then I would say that that is likely to encourage recipients of that communication to become more aware of the issue and to link it to the legislator more. That, I think I would say.

Q. Would you agree that organizations that want to influence government policy often engage in grass-roots lobbying?

A. Yes.

Q. As a means to influence current office * * *.

* * * * *

[45]

Q. Okay.

(Witness reviews documents.)

A. Done.

BY MR. BOPP:

Q. Good. Would you agree that Exhibits 6 through 13 are newspaper articles reporting on grassroots lobbying efforts by specific organizations and their purported—reporting on their purported success in influencing the government on what public policies they would adopt?

MR. DEELEY: Objection, compound and vague.

A. I wasn't aware they were newspaper articles. And could you restate the rest of it.

BY MR. BOPP:

Q. Okay. You notice the, for instance on Exhibit 6 at the bottom, find articles is the web site.

MR. BOPP: Would you repeat the question for me, please.

> (The record was read aloud as follows: "QUESTION: Would you agree that Exhibits [46] 6 through 13 are newspaper articles reporting on grass-roots lobbying efforts by specific organizations and their—reporting on their purported success in influencing the government on what public policies they would adopt?")

MR. DEELEY: I also object as outside the scope of the expert testimony.

A. They appear to be.

BY MR. BOPP:

Q. Let me show you what's been marked as Exhibits 14 through 16.

> (Plaintiff's Deposition Exhibit Numbers 14 through 16 were marked for identification.)

MR. BOPP: Go ahead and put these up here, keep them—

THE WITNESS: Okay. I was just trying to keep them straight in my mind about which ones are which. So you want me to review these as well; is that correct?

BY MR. BOPP: Yes, Exhibit 14 through 16.

[47]

MR. DEELEY: Are you okay as far as water and—

THE WITNESS: Yeah, I'm good.

MR. DEELEY: —everything?

(Witness reviews documents.)

A. There's also some truncation on the right of the Exhibit 16.

BY MR. BOPP:

Q. Thank you.

A. Okay.

Q. And with respect to Exhibits 14, 15 and 16, would you agree that these are web pages reporting on, reporting by organizations on their specific grassroots lobbying efforts?

MR. DEELEY: Objection—are you done with the question?

MR. BOPP: Mm-hmm.

MR. DEELEY: Vague, compound and outside the scope of the expert testimony.

A. They appear to be. Some of them look more like web pages than others, but I agree that they are reporting on their efforts.

[48]

(Plaintiff's Deposition Exhibit Number was marked for identification.)

BY MR. BOPP:

Q. I show you what's been marked as Exhibit 17.

A. This is also truncated on the right.

(Witness reviews document.)

BY MR. BOPP:

Q. With respect to Exhibit 17, would you agree that this exhibit purports to be a press release from Senator Charles Schumer of New York wherein he is kicking off a grassroots lobbying effort to influence governmental action, specifically the U.S. Postal Service Stamp Advisory Committee, with respect to a certain proposal?

MR. DEELEY: Objection, compound, vague, and the document speaks for itself and outside the scope of the expert testimony.

A. Yes.

BY MR. BOPP:

Q. Number 18.

(Plaintiff's Deposition Exhibit Number 18 * * *.

* * * * *

[53] them you can have the question in mind, maybe that will be helpful. And my question would be: Do these exhibits, 18 through 24, appear to be web pages from various organizations encouraging their supporters to engage in grassroots lobbying regarding issues that are of concern to that organization?")

MR. DEELEY: I renew my objections that I've previously stated.

A. Yes, among other things.

BY MR. BOPP:

Q. Now, if you were—let's start with this. I understand your testimony that you have not done a research project on the involvement of organizations and grassroots lobbying?

A. That's correct.

Q. Now, if you were to conduct such a study would articles that appear in the Journal of Politics be the types of articles that would be viewed by you as a reliable authority within your area of expertise?

[54]

A. I wouldn't use the word "authority," but the Journal of Politics is a very reputable professional journal, yes.

Q. Within your area of expertise?

A. Yes.

(Plaintiff's Deposition Exhibit Number 28 was marked for identification.)

BY MR. BOPP:

Q. I show you what's been marked as Exhibit 28, and my question is: Would you agree that this purports to be an article from the Journal of Politics, entitled "Interest Niches and Policy Bandwagons Pattern of Interest Group Involvement in National Politics"?

A. Yes.

Q. In reviewing your resume, you appear to be identified often as an expert in polling.

A. Yes.

Q. And what is that area of expertise?

A. Broadly, political polling, or public opinion polling more generally, sampling questionnaire design, analysis.

* * * * *

[62] web site visited May 31st, 2006, which lists the members of the team. It says "Meet the Team," and you are not listed as a member?

MR. DEELEY: Objection, compound and the document speaks for itself.

A. That's correct.

BY MR. BOPP:

Q. Would you agree that the work of the Wisconsin Advertising Project is a reliable authority that would be relied upon by those in the field?

MR. DEELEY: Objection, vague.

BY MR. BOPP:

Q. Field of expertise?

A. Yes.

Q. Are you aware—well, before I do that, let's go back to your report, Exhibit 1.

Is it fair to summarize your report that the discussion of public policy issues can affect an election?

A. Yes.

Q. Now, that is true even if particular [63] candidates or public officials are not identified in the discussion?

A. Yes. You are using the term "discussion" in what sense?

Q. Public communications.

A. Yes I agree.

Q. And that the degree of effect on an election cannot be determined by the examination of the communication itself?

A. By the words on the page from the script, I would agree with that.

Q. Partially because the effect of a particular communication is influenced—is affected by other communications in the environment. Is that true?

A. Yes, I would agree with that.

Q. And that as long as it's a public communication, that is, a communication to members of the public through some means, it can have an effect on the election that it's not dependent on the mode of communication?

A. The effect would surely vary across modes [64] and exposure, repetition, but public communication of this sort certainly can have these effects.

Q. Can have an effect on an election?

A. (Nodding head.)

Q. So, in other words, telemarketing, in other words, phone calls, or newspaper advertising or direct mail or web site information or radio and television advertising,

or for that matter, discussions on radio talk shows or news broadcasts or, in other words, all of—the fact that all communication could affect an election, it's not dependent by which of those modes of communication because all of them could affect—a communication through any of those modes could affect an election. Is that right?

MR. DEELEY: Objection, compound and vague.

A. I would say it's an empirical question what the effects are across different modes, intensities, and so on, but in principle, any of them have effects. Without empirical research, it's difficult to say how much any one of [65] them would.

BY MR. BOPP:

Q. And that includes communications that don't mention candidates or public office holders can have an effect on election through any of those modes of communication?

A. A communication that deals with politically relevant issues need not mention the candidates in order to have an electorally relevant impact.

Q. Let's turn to page 8 of your report. Now, page 8 reports on three press releases by a Senator Bob Welch. It reports on a November 18th article in the Milwaukee Journal Sentinel. It reports on a press release by Wisconsin Right to Life.

Am I missing anything in terms of the modes of communication that you are reporting on here?

A. No, in this particular section those are the ones that I'm talking about.

Q. What else did you find in your research in terms of the discussion of the filibuster issue in * * *.

* * * * *

[72] affecting public officials. Wisconsin Right to Life is also broadly available or involved in legislative issues and their members are surely part of that. I did not do research on specific acts of mobilization by them. I'm reporting more the Wisconsin Right to Life's discussion of their grassroots organization.

Q. Now, I assume you've been made aware as part of your preparation of your expert report that Wisconsin Right to Life used its advertising as grassroots lobbying about affecting votes in the U.S. Senate on the filibuster issue. Is that right?

A. That's correct.

Q. Okay.

A. Well—

Q. That that is their position?

A. Actually, as I understand it, which is based on reading their releases, the documents that we have in front of us, they characterize the advertising campaign as about this issue about that. They also connected it with the issue of challenging the BCRA restrictions, and so I wouldn't say it was a single purpose as described by them in the [73] documents that I read, but it has at least the dual purposes of the grassroots lobbying as well as the opportunity to challenge the restrictions, or the regulation, I should say.

Q. If you were aware that Wisconsin Right to Life viewed this, at least in part, this advertising campaign, as a grassroots lobbying campaign about affecting upcoming votes in Congress, why did you not research the grassroots lobbying efforts of Wisconsin Right to Life generally or specifically?

A. I saw that as outside of the questions that I was asked to address. I was asked to address the broad role of, or the broad context of the 2004 election and to situate Wisconsin Right to Life within that and within Wisconsin politics. And I did that in a general way citing the information that was available to me. I don't know how I would do a scientific study at this point retrospectively of their mobilization efforts. That seemed far beyond what could reasonably be done in a report of this nature.

Q. Were you asked to do a research—to [74] opine on the question—were you asked to opine on the question of the effectiveness of grass roots lobbying in influencing votes in Congress when that lobbying campaign is directed at that, for that purpose or at that activity?

A. I was not asked to do that.

Q. Have you ever done that?

A. No.

Q. Why weren't you asked to do that?

MR. DEELEY: Objection, calls for speculation.

A. I wouldn't have any way of knowing.

BY MR. BOPP:

Q. Did anybody tell you why, why—to ignore the lobbying question?

A. No, no one told me to ignore the lobbying question. The issue didn't come up.

Q. Why did you think it was not relevant?

MR. DEELEY: Objection, assumes facts not in evidence.

A. I was asked to comment on the role of advertising and its likely effects in this case. I [75] was not asked to review the literature on grassroots lobbying, and so I did not.

BY MR. BOPP: Likely effects on what?

A. I'm sorry. Likely effects of what on what?

Q. In your answer, you just said: I was asked to review the likely effects. And my question is, the likely effects of what on what?

A. Okay. The effects of advertising on elections generally, the effects of what we would expect or believe based on the empirical literature, the effects of advertisements such as the Wisconsin Right to Life advertisements might be expected to have on an election.

Q. But you are not asked and you did not decide to opine on the question of what effect these advertisements would have on their efforts to influence votes in Congress?

MR. DEELEY: Objection, compound.

A. No.

BY MR. BOPP:

[76]

Q. In describing or in sort of summarizing your report, you mention that the public communications on an issue could affect an election but the degree of effect, the amount of effect is dependent on what? I know you've identified a whole series of things in your report. So what would be the critical features, factors?

A. Part of the question is an empirical one, meaning it can't be answered a priori of what makes one ad effective and another not, so I'm going to set that aside.

In terms of the impact that ads have on voters, important areas are characteristics of the voters, how attentive they are to politics. Other characteristics of the voters, their predispositions, partisan or ideological, those are the most prominent. And those affect or influence the extent to which voters are, in the first place, exposed to advertising and, secondly, the extent to which they accept the message of the ad conditional on them having been exposed to the ad.

Those are things which have effects as * * *.

* * * * *

[81] "QUESTION: But having a competing message will adversely affect the persuasiveness, if you will, or the effect of one message because you won't have as big an effect on voting behavior if you have competing messages, as I understand your report. Is that correct?")

A. No.

BY MR. BOPP:

Q. Okay. How would you say it then?

A. What competing messages do is raise the salience for partisans on both sides. So what it would mean is that—can we just call them pro and anti, for the sake of simplicity?

Q. Mm-hmm.

A. The people who are predisposed to the pro side can be stimulated, can become more, find the issue more salient as a result of messages from either side of the debate, okay? And so the implication is that in a high stimulus case with two sets of competing messages, partisan predisposition should be enhanced and so potential supporters of [82] the pro side are, in fact, more likely to absorb the pro message, incorporate it and become more aligned on that basis even in the presence of competing anti messages.

Now, the net effect is likely to be reduced. In a one-sided communication, everything is pushing you this way, and especially the less involved and less partisan people, who are really the people that move the most, if they are only exposed to a one-sided message, they will be carried along by that message more, whereas with competing two-sided messages, they'll get both and the effects will tend to cancel one another out.

Q. What effect does timing have on voting behavior in an election?

MR. DEELEY: Objection, vague.

A. Do you mean timing before the election, the number of days before the election day?

BY MR. BOPP:

Q. Yeah, timing of the message beforehand.

A. The empirical evidence seems to demonstrate that advertising that's closer to [83] election day has larger effects on shifting either vote preferences or actual vote counts. There is, in the first place, a sizable proportion of undecided voters up through election day in most contests. They are available for persuasion. And the evidence that's cited in the report finds empirically that in the latter stages of the election, the impact of advertising seems to increase in its effect on vote choice and vote preferences.

Q. I recall you cited a study regarding two weeks prior to the election.

A. Yes.

Q. All right? Are there studies that go—that examine the ultimate effect of messages in a time period greater than two weeks?

A. I have not found in the literature anything that addresses other time scales, so I'm not aware of research that specifically addresses any arbitrary point before that.

Q. Okay. How about messages that are two and a half months before an election?

[84]

A. I know of no direct evidence on that.

Q. Two months before an election, do you know of any—

A. No.

Q. —evidence or studies?

A. No, I don't.

Q. One month before an election?

MR. DEELEY: Objection, asked and answered.

A. To the extent that the Johnston book that's cited in here does look at the impact of advertising over the entire course of the campaign coming up to election day, they find that advertising continuously updates voters' preferences, and so the effect of past advertising sets the level that you are starting from but the effects of advertising in this week then moves you up and down relative to that.

So based on their empirical evidence, the implication would be that earlier advertising had a effect and helped push the level to a particular point but then subsequent advertising moves that. [85] In other words, there's not a long-term persistence of the earlier ads, they get—they set the stage, if you will, for this week's ads, which then move you up and down relative to that. So they are an argument for both a continuous effect of advertising throughout the campaign period as well as a greater influence of late campaigning because you'll always shift in response to the current advertising as well.

BY MR. BOPP:

Q. When you say "current advertising," what is it—is it advertising on the same subject or is it no matter what the subjects are you have this effect?

A. In their case, they are looking at total pro- or anti-candidate advertising. So the net advertising for each of the two candidates regardless of the specific nature of the issue.

Q. Has there been any studies on advertisements on a particular issue throughout the time period?

A. Not that I'm aware of.

[86]

Q. And so when you've used the phrase "media 2 message," that would include any public communication. It would include ads, but it would include any public communication like the evening news broadcast, talk radio, anything of that nature?

A. Yes.

(Discussion off record.)

(Recess taken.)

BY MR. BOPP:

Q. By the way, between the time you submitted the draft report and your final report, what conversations did you have with anyone associated with this case?

A. I gave them the draft on—sorry—Wednesday morning. We had a discussion that afternoon at 5:30. Then I gave another draft on Thursday afternoon which resulted in a Friday discussion of typos essentially. And then we had check-in just to make sure where we were in terms of meeting the deadlines and everything. The only—yeah, yeah. I think that's right. Sorry, I don't—I don't think there were other * * *.

* * * * *

[93]

A. That targeting thing, I'm not sure whether that was specific to radio or was television.

Q. Okay.

A. From the document I don't think it's clear whether it was just radio or TV or both.

Q. Okay.

A. I'm just not clear about that.

Q. It says that for this audience, meaning the targeted audience, "the public policy aware adults, ages 45+ with male skew," it says that it is unlikely that political ads will change opinions in this group. Is that what your report is reflecting?

A. If what they were targeting is what that thing said, "public policy aware adults," I understood that to mean people who had substantial amounts of political interest and involvement, so for those people, the messages that they would hear, whether it was the radio or the TV, either one of those, would tend to actually be noticed because they are politically aware and involved and interested, but it's also less likely that it would [94] change someone's mind to the extent that it would, because these are already aware and involved people, they would tend to resist the change if it's a message that runs counter to their preferences. So it should reinforce people that are already concerned about the judicial nominations issue, and it should not be expected to convert someone who feels on the other side. That's what I'm saying.

Q. Okay. Would this be an audience that you would want to target if you were wanting the listener to respond by calling a senator about the issue and lobby them?

A. As an empirical question, these would be the people that are probably most likely to be involved enough to make a phone call or a contact, though they may be people that would already be mobilized. So I think the answer is probably yes, these would be people that would be more likely to make the call than people who are the opposite, unaware, uninvolved, yes.

Q. Turn to page 38. The first full paragraph, the last sentence says, "Early ads matter * * *.

* * * * *

[98] to work their way back down from that if it's a competitive process, but it's not the case that these ads, the moment of 60 days before, say, continue to independently affect the vote as we go along, rather they set the baseline that's then moved about by these other things.

BY MR. BOPP:

Q. Okay.

A. It's a tricky question of auto correlation in the form of the model, which we can talk about if you prefer.

Q. Well, I don't want to get in over my head.

(Plaintiff's Deposition Exhibit Number 30 was marked for identification.)

BY MR. BOPP:

Q. I'm going to show you what's been marked as Exhibit 30. Now—oh, gosh. I take it back. You can't read that. You could before. Sorry, I have no questions on 30. Sorry about that.

Are you familiar with the Wisconsin Advertising Project publishing an online, at least, maybe in other contexts as well, a report called [99] Political Advertising in the 2002 Elections?

A. Not specifically, no.

Q. Okay.

(Plaintiff's Deposition Exhibit Number 31 was marked for identification.)

MR. DEELEY: Jim, before you do that, are you going to leave Exhibit 30 attached to the deposition?

MR. BOPP: Yes.

MR. DEELEY: I'm going to ask to get a copy of it.

MR. BOPP: Yeah, I think we need to do that, even though it's not of much value.

BY MR. BOPP:

Q. I show you what's been marked as Plaintiff's Exhibit 31. Now, this purports to be that report by Professor Goldstein and Rivlin, R-I-V-L—is that his last?

A. —I-N.

Q. —I-N. Right. That was found on the Wisconsin Advertising Project web site. Now, is this the type of report that would be a reliable [100] authority that would be relied upon by people, experts in your field?

A. I haven't seen the report, but given that, yes, this would be a credible source of information.

Q. Would you hand me that. I marked the wrong version. I'll have her—

MR. BOPP: Would you mind just putting Exhibit 31 over top of that.

(Plaintiff's Deposition Exhibit Number 31 was remarked for identification.)

BY MR. BOPP:

Q. I hand you Exhibit 31 and—because I marked the wrong copy. Are you familiar with the Election Law Journal?

A. I'm sorry, just say it again.

Q. The Election Law Journal?

A. No.

MR. BOPP: All right. I have no further questions.

MR. DEELEY: Okay.

* * * * *

[Exhibit 1]

Additional Excerpts from Transcript of Deposition of Charles H. Franklin, III
Exhibit 1

[Filed: June 30, 2006]

* * * * *

[11] to Life and Wisconsin politics, just sort of the setting of the situation, the role of advertising, the role, in general, in election, the role of the particular Wisconsin Right to Life advertising in that 2004 campaign. And the issues of how to specify a regulation or the difficulty over the ability to regulate grassroots or issue advertising in campaigns.

So those were the subject matter that we talked about as being included. And then we had a conversation on May 15th, I believe it was—

Q. Well, before we get to that, May 15th, I'll ask you about that in a second.

A. Yeah.

Q. You said that in early May that the FEC asked you to be a witness. Had you expressed any opinions on the subject maters that were the subject of your expert testimony at that point to them or anyone else associated with the case?

A. In the first conversation I said I didn't know what the advertising was, I hadn't seen it. I was out of the country when it ran, actually, but * * *.

* * * * *

[14] argument coming together. I didn't go into great detail about it, simply to update him that the report was coming along.

Q. You say the argument was "coming together." What did you mean by that?

A. I approached this the way I would a scholarly article, which is to think through what's there, to look at the evidence, and then to formulate my opinion and in formulating my opinion, to write it down, and in that sense the argument was coming together. It was becoming clear in my mind what the report would say and how it would say it.

Q. Okay. What was provided you by the FEC or anyone associated with this litigation to, as part of your efforts to prepare an expert report?

A. There was one binder or clip-together binder, which were the FEC exhibits in opposition to the preliminary injunction, and there was an unlabelled group of documents, which were statements like press releases or e-mails from Wisconsin Right to Life supporters, I believe. Also a description of the advertising was part of that. [15] The script of the TV and radio ads was part of that. The targeting information, the design of the advertising, what its target audience was and what the message was was part of that. There were a couple of other documents in there, but I don't remember precisely what they were. And—

Q. Go ahead.

A. Just to finish.

Q. Sure.

A. Then later in the process, Kevin Deeley e-mailed me documents on the advertising buys, how much both the radio and the TV ad buy was for because I hadn't seen that before.

Q. When you said "the description of the advertising," what did you mean by that?

A. Well, two things, one was the scripts themselves for the two radio ads and for the television ad. Then there was a document that listed the targeting of the ad. It described who the target audience was, Policy, Aware 45 Plus with a mail skew, for example, listed three messages that were part of the goals of the advertising and so on.

[16]

Q. What else did you consult in preparing this report beyond what was provided you by the FEC?

A. I looked at the history of the Feingold elections, so I reviewed the Almanac of American Politics' description of the '92, '98 and 2004 elections. I did a review of the Hot Line political newsletter, I guess we'd call it, digest of election information to construct a chronology that, of those campaigns, and in particular 2004, but also '98.

I did a number of searches of Lexis/Nexis for news stories, both about the campaign and about Wisconsin Right to Life and its involvement in Wisconsin politics. That formed the basis of the section of the report that deals with the historical setting in the campaign and Wisconsin Right to Life in there.

I also did some looking for examples of the judicial nominations issue in other campaigns nationwide. I looked at those in part in what are called storyboards. They are files that are summaries of advertising from the Wisconsin Advertising Project to locate advertising that had [17] shown up in other races. And I did some searches of public opinion data on the question of the judicial filibuster, judicial nominations during that period.

Q. Was there any material that you consulted that you did not cite in the report?

A. There's material that I consulted but didn't cite because I decided it wasn't relevant to the report.

Q. Was there any material that you found that you did not cite in your search that was relevant to the report?

A. I tried to cite everything in the report that I used as a basis for the report.

Q. Now, you mentioned that you researched the filibuster issue as used in advertising. What did you mean by that?

A. I was curious whether this issue had been prominent in other campaigns. I thought at the time that I was looking for it, that that might or might not be relevant, so I did locate some other campaigns where the issue had come up, but in drafting the report, I decided that that wasn't * * *.

* * * * *

[20] impact of those ads, but I didn't have—I didn't have exposure of the individuals to which of those ads. Let me try and phrase that a little better.

Q. Okay.

A. We know that these ads ran, but when the Pew study asked did you see advertising, it doesn't ask which ad did you see. And my purpose in the report was to show that exposure to advertising from either side of the issue or just advertising in general about the issue increased the constraint that I talk about in the report,

so I didn't think that the specific content of the individual ads was relevant at that point.

Q. Now, in looking at those ads, were some of them just on the issue of the filibuster without naming public officials or candidates?

A. Yes, I believe there were.

Q. Were there ads that mentioned public officials or candidates?

A. Yes, there were.

Q. So there was both type?

A. Yes.

* * * * *

[27] ran through May 22nd.

Q. Why did they end?

A. They ended because of the bipartisan agreement, the so-called gang of 14, that resolved the filibuster debate.

Q. Do you know why they, why they began when they began?

MR. DEELEY: Objection, calls for speculation.

A. The Republican leadership had signalled clearly that it was ready to bring an end to the democratic filibuster through the so-called nuclear option, to change the rules to require only 51 votes to end debate on judicial nominations. That was a possibility that had been discussed at some length for some number of months before that, but in the March to May time frame, it was clear that it was going to be scheduled. I don't know if

it was specifically scheduled at that time or not, but it was clear it was coming to a head, and so groups on both sides started to run advertising.

Q. What was the advertising saying?

* * * * *

[38]

A. I would, again, say these are certainly elements of grassroots lobbying, but I wouldn't agree that this is a complete definition of grassroots lobbying.

BY MR. BOPP:

Q. Right, okay. And what I'm asking is whether or not a communication that contained these three elements would fall within the definition of grassroots lobbying?

A. I think it would depend in part on the setting and the nature of the effort beyond this. I agree that these three elements are present in grassroots lobbying campaigns as routinely defined, but one can imagine the same elements being literally present in one context and having a very different impact or effect or purpose than having the same elements in another.

And so to that extent, I agree that these are characteristics of grassroots lobbying but don't exhaust the nature of it. And I would not say that these three being present necessarily mean that an effort is clearly only a grassroots lobbying effort.

* * * * *

[79] accessible to voters. They are more likely to think of it or include it in their decision calculus. But

competition in the environment also means that voters are also more likely to be exposed to competing messages, and so they are more likely to hear multiple messages about an issue.

Q. And how does competing messages affect the voting behavior, or how one ad affects the voting behavior if there are competing ads, or competing messages, let's—

MR. DEELEY: Objection, compound.

A. The empirical literature shows that voters who are exposed to a message can either accept or reject that message. And so if they are exposed to competing messages, it's more likely they will be exposed to a message that they can agree with and then accept than not. In contrast, in a one-sided message environment, where they only hear one side speaking, it's more likely that those messages will have a net effect on public opinion or vote choice because there is no competing message to reinforce the other side of the issue.

* * * * *

[89] referring to it as a broad issue ad. I was trying to say that it was a generic ad and the thrust of the papers, the report is still what it—was then what it is now, that any advertising, whether it's called grassroots ad or issue ad or electioneering, would have electioneering effects. And so I used the term "issue ad" as a characterization of it. My intent was this broader sense of any advertising.

Q. Or any message?

A. Or any message. Yes, I would agree with that. And so they pointed out that I was being rather imprecise about how I was using that and potentially characterizing the ad in a way that I didn't intend to because I meant this much broader sense, so I changed that.

I also changed most of the repetition of the term "issue ad" to simply "advertisement" or some synonym for that, again, to make my point that this applied to communications during the campaign period generally. I don't think any of those were substantive changes, but they did change the language.

* * * * *

[97] motivating people to lobby on that issue, make the call?

Q. Okay.

MR. DEELEY: Objection, vague.

BY MR. BOPP:

Q. I'm posing a hypothetical and I'll complete my answer.

And, but that the effect, you know, 60 days from there would be ameliorated by subsequent events. Is that a fair summary?

MR. DEELEY: Objection, vague, mischaracterized the testimony.

A. Ameliorated is not quite the right term for the process they are describing in that the effect was real, it adjusted opinion or preference, however it adjusted it. It's simply that all of the subsequent advertising moves opinion from that new starting point. All right. And so

you could say that an early event that moves opinion well up has an effect in that all the subsequent advertising has to affect people that are now, say, 70 percent disposed to an issue or to a candidate, so they have [98] to work their way back down from that if it's a competitive process, but it's not the case that these ads, the moment of 60 days before, say, continue to independently affect the vote as we go along, rather they set the baseline that's then moved about by these other things.

BY MR. BOPP:

Q. Okay.

A. It's a tricky question of autocorrelation in the form of a model, which we can talk about if you prefer.

Q. Well, I don't want to get in over my head.

(Plaintiff's Deposition Exhibit Number 30 was marked for identification.)

BY MR. BOPP:

Q. I'm going to show you what's been marked as exhibit 30. Now—oh, gosh. I take it back. You can't read that. You could before. Sorry, I have no questions on 30. Sorry about that.

Are you familiar with the Wisconsin Advertising Project publishing an online, at least, maybe in other contexts as well, a report called * * *.

* * * * *

[103]

THE WITNESS: But I can continue to answer, right? For the earlier—

BY MR. DEELEY:

Q. Yes, you can answer.

A. Yes, advertising in general is usually multifaceted. It doesn't only focus on one specific thing, so it could aim at persuasion as well as mobilization at the same time. It could aim at effecting legislation by pressuring a Congressman or an office holder, let's say, and at the same time have other purposes. That could be an electioneering purpose in that the sorts of issue ads that I'm talking about that satisfy these conditions, they certainly represent what I take to be a sincere policy position by the organization in opposing whatever policy they are discussing while at the same time having an overt, a direct electioneering consequence.

MR. DEELEY: No further questions.

MR. BOPP: No questions.

(Signature having not been waived, the deposition of CHARLES H. FRANKLIN, Ph.D., was * * *.

* * * * *

Excerpts from Transcript of Deposition of Charles H. Franklin, III

Monday, June 5, 2006

[Filed: July 14, 2006]

* * * * *

[33]

A. Yes.

Q. Do you agree that what's being done there, at least in part, was grassroots lobbying?

MR. DEELEY: Objection, vague.

A. Yes, I would agree that that falls in the usually accepted notion of grassroots lobbying.

BY MR. BOPP:

Q. Was there any aspect of the two campaigns, one on each side, that you reviewed that was not grassroots lobbying, that you would say would be your opinion was not grassroots lobbying?

A. My view is that both the types of ads we've talked about involve grassroots lobbying, that there are, there's a range of what grassroots lobbying covers and I would say both of these fall within that category. They could also equally well, I think, be thought of as issue ads. I believe the distinction between those two is vague, so—

Q. Is vague?

A. Is vague—

Q. Oh.

A. —so I would put them in either-or both [34] categories.

Q. Let's explore that for a minute. You are familiar with the phrase "issue advertising"?

A. Yes.

Q. Now, how would you define that?

A. This is where the vagueness comes in, of course. An issue advertisement, in the broad sense that I use the term, and intended in the report as well, is any advertising by a group, usually not a candidate or a political party, but which discusses an issue, usually takes a position on the issue, and may or may not imply something or say something about candidates or office holders' positions on that issue.

So when I use the term "issue advertising," I mean it in that relatively broad sense. And it's in that sense that these things that we could also call grassroots lobbying are, in my broader terminology, equally well thought of as issue ads.

Q. Would it also be true that the phrase as you define it of "issue advocacy" is broader than [35] what you understand grassroots lobbying to be?

A. To the extent that a grassroots lobbying only implies a connection to a particular office holder, then I think that would be a definitional distinction between the two.

Q. Is it fair to say that grassroots lobbying is, based on your definitions, a subcategory of issue advocacy—or issue ads?

A. Yes, in the sense that I'm using it here and in the report, I think of them as closely linked and that grassroots lobbying, again, for the most part, would be a subcategory of issue ads.

Q. When you are researching the filibuster issue and you found these two campaigns being conducted by these groups on the filibuster issue that we've just been talking about, are you familiar with other groups doing grassroots lobbying on issues about upcoming votes in Congress?

A. Yes.

Q. And when you say you are familiar, what do you mean by that?

A. I mean that I'm aware that such things [36] happen. I have not done a scholarly investigation of such things myself, so I don't have detailed expert knowledge of specific campaigns of that sort.

(Plaintiff's Deposition Exhibit Number 4 was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as Exhibit 4. And would you review that document which, I believe, defines various terms associated with lobbying and other forms of advocacy.

(Witness reviews document.)

MR. DEELEY: I object to the document to the extent it's, a margin is cut off.

A. Okay.

BY MR. BOPP:

Q. Now, I'll refer you to page 2 of the exhibit at the bottom, and there's the heading: Grassroots Lobbying. And then it says: Key indicators of grassroots lobbying. And there are three bullets points: Relates to specific

legislation, reflects a point of view on the legislation's merits, encourage general public [37] to Contact legislators.

Do you agree that those are the three key elements of grassroots lobbying?

A. They are certainly three things that do appear within grassroots lobbying. I wouldn't agree that they are wholly and completely definition of grassroots lobbying.

Q. What else would you add?

A. I would include efforts to mobilize supporters as part of that. I would include efforts to persuade the public as part of that.

Q. Generally on an issue?

A. Yes, well, on a specific issue.

Q. Yes. Such as the second type of advertising that you identified that the groups were doing?

A. Yes.

Q. But a communication that contained these three elements, you would agree, is grassroots lobbying?

MR. DEELEY: Objection, mischaracterizes the testimony.

[38]

A. I would, again, say these are certainly elements of grassroots lobbying, but I wouldn't agree that this is a complete definition of grassroots lobbying.

BY MR. BOPP:

Q. Right, okay. And what I'm asking is whether or not a communication that contained these three elements would fall within the definition of grassroots lobbying?

A. I think it would depend in part on the setting and the nature of the effort beyond this. I agree that these three elements are present in grassroots lobbying campaigns as routinely defined, but one can imagine the same elements being literally present in one context and having a very different impact or effect or purpose than having the same elements in another.

And so to that extent, I agree that these are characteristics of grassroots lobbying but don't exhaust the nature of it. And I would not say that these three being present necessarily mean that an effort is clearly only a grassroots lobbying effort.

[39]

Q. Now, are you—is grassroots lobbying, at least on occasion, tied to upcoming votes in Congress?

A. Yes.

Q. Now, are you familiar with the fact that Congress is often in session in the fall of election years including within 60 days of an election?

A. Yes.

Q. And are you familiar with grassroots lobbying campaigns having been conducted during that period of time to influence an upcoming vote in Congress?

A. I'm not specifically familiar with that.

Q. Would you be surprised or would that be incompatible with your experience that such campaigns would be conducted in that time period?

A. In the past, before these issues before us came up, it certainly is plausible that it would have happened, and I simply don't know of specific cases.

(Plaintiff's Deposition Exhibit Number 5 [40] was marked for identification.)

BY MR. BOPP:

Q. Let me show you what's been marked as Exhibit 5. Would you review that document, please.

(Witness reviews document.)

BY MR. BOPP:

Q. Actually, this document should only be a three-page document. Do you have an additional page attached to it?

A. Yes, I do.

Q. Could we pull that off? Sorry.

A. Okay.

Q. I want to refer you specifically to page 2, under the heading "Attempts to Influence Legislation (Lobbying) Defined," in the second paragraph, the last sentence, which begins on line, sixth from the bottom, at the end. It says: "Communication will be treated as encouraging the recipient to take action (but not directly encouraging the recipient to take action—for relevance

of this distinction see exceptions for communications with members below) if it identifies * * *.

* * * * *

[Exhibit 13]

Declaration of Charles H. Franklin, III
Exhibit 13

[Filed: June 23, 2006]

[Exhibit 1]

Expert Report of Professor
Charles H. Franklin
Professor, Department of Political Science
University of Wisconsin, Madison
Case 1:04-cv-01260-RJL-RWR

June 2, 2006

1 Introduction

In this report I review the circumstances of the 2004 Wisconsin campaign for the United States Senate and discuss the empirical evidence for the effects of advertising in elections.

I have not appeared as an expert witness in the last four years. I am being paid $ 225 per hour for my work on this report.

2 The 2004 Wisconsin Senate Campaign

In 2004 Wisconsin Senator Russell Feingold sought reelection to a third term in the United States Senate. Senator Feingold was initially elected in 1992 when he defeated two term incumbent Robert Kasten with 52.6% of the vote to Kasten's 46.0%. The race was the 10th closest U.S. Senate race of 1992.

In 1998 Feingold faced a two term member of the U.S. House of Representatives, Congressman Mark Neumann of the 1st congressional district. This extremely competitive race ended with Feingold winning by the third narrowest margin in the country, 50.5% for Feingold to 48.4% for Neumann, a margin of less than 38,000 votes.

Both candidates put substantial campaign emphasis on protecting social security, wasteful government spending and balancing the budget. Neumann had established himself as one of the most serious "deficit hawks" in the House, even breaking with his party's leadership at times * * *.

* * * * *

* * * ified *[sic]* endorsement of Darrow on March 5, 2004.[15] In a press release announcing their endorsements, Wisconsin Right to Life PAC also made clear their opposition to Feingold:

> "Russ Feingold is so extreme in his anti-life position and the U.S. Senate is so important to the future of unborn babies that the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections" said Plaff.[16]

In the September 14, 2004 primary Tim Michels won 42.43% followed by Darrow with 30.05%, Welch with 23.09% and Lorge with 4.35%.

The potentially strong Michels campaign failed to catch fire with voters. Despite an attractive and articulate candidate and very high quality ads, Michels could not close the gap with Feingold in the polls. While immediately after the primary he pulled to a 51-45 margin among likely voters in an ABC News poll, he was not able to sustain this performance. Perhaps the worst blow to his campaign came when the National Republican Senatorial Committee reduced its commitment to

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[15] FEC opp. preliminary injunction exhibits 4, 5, and 6.

[16] WRTL news release quoting Bonnie Pfaff Wisconsin Right to Life Pac Chair. FEC opp. preliminary injunction exhibit 4.

the Michels campaign in early October.[17] On October 13 the NRSC announced it was canceling a $1.2 million ad campaign in support of Michels.[18] This was a severe setback not only because it substantially cut pro-Michel's advertising because it left the campaign to explain how things could still be going well if the NRSC had decided to pull out of the race. While the NRSC did eventually commit some resources to the Wisconsin race, it came too late for Michels to recover.

The final outcome was 53.3% for Feingold to 44.1% for Michels. Even so, this was not a large margin for a third term incumbent. The race was the 10th closest Senate race in 2004.

3 The Politics of Judicial Nominations

The issue of judicial nominations became an issue in Senate politics almost from the moment Republicans reclaimed the majority in January 2003. Democrats, now without the majority, could no longer block nominations by simply not bringing them to a vote, as they had done during most of the previous two years.

The Senate custom of unlimited debate provided a mechanism for Democrats to continue to block those judicial nominations which they most strongly opposed. A cloture vote requires 60 votes to cut off debate so long as Democrats remained united, they could block President Bush's nominations.

This in itself would not have created a substantial political issue. In the late Clinton administration it was routine for the Republican controlled Senate to fail to

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[17] Hotline 10/5/2004; Frommer-AP 10/4/2004

[18] Hotline 10/14/2004; Milwaukee Journal Sentinel 10/13/2004.

bring nominations to the floor for a vote. What changed in 2003 was that conservatives, and especially pro-life groups, saw the transformation of the judiciary as key to achieving their policy goals in general and to overturning *Roe* v. *Wade* in particular. This connection of the most divisive and emotional social issue to the confirmation of judges gave the issue a political influence and importance well beyond the normal politics of judicial nominations.

Between March 2003 and June of 2004 Senate Democrats had blocked confirmation votes 16 times. The Senate Republican leadership attempted to break the impasse several times, including a 40 hour marathon session in November 2003. Despite intense pressure the Democrats remained sufficiently united to continue to block a number of nominees (though many more were confirmed with little controversy.)

The Republican leadership made another attempt at ending the deadlock in July 2004, holding four votes on stalled nominations between July 20 and 22, ending with the 20th failed attempt.

Confirmation of judges became an electoral issue as well as a matter of Senate procedure. While the issue did not dominate the fall elections, it did arise fairly often in Republican candidates' statements that they would vote to confirm President Bush's judges. Sen. Orrin Hatch (R-Utah) wrote: "The obstruction of judicial nominations generally, and these filibusters specifically, figured significantly in 2004 Senate races across the country, particularly the race in South Dakota."[19]

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[19] The Hill, http://www.hillnews.com/thehill/export/TheHill/Comment/OpEd/021005.html.accessed6/2/2006.

The stalemate was not broken until May 23, 2005 when a bipartisan coalition of fourteen senators agreed to vote for cloture on most of the President's most controversial judges in exchange for no changes to the filibuster rule and the ability to continue to block nominees that De- * * *.

* * * * *

[Exhibit 2]

Additional Excerpts from Declaration of Charles H. Franklin, III
Exhibit 2

[Filed: Aug. 30, 2006]

* * * * *

[8] mocrats [*sic*] could not agree to. Since that agreement, the filibuster has not been successfully used to block judicial confirmations.

4 Judicial Nominations in Wisconsin in 2003 and 2004

The subject of judicial nominations was raised as a partisan issue early in the Wisconsin campaign by state Sen. Bob Welch. In three news releases in 2003 Welch raised the issue of the Democratic filibuster against some of President Bush's nominees.[20] In these, Sen. Welch "called on Senator Russ Feingold to end his support of the filibuster of four of President Bush's judicial nominees."[21] He characterized Feingold's support of the filibuster as partisan, saying "the gridlock caused by Russ Feingold's partisanship was appalling. . . . Because of his obstructionism the wheels of justice are in danger of grinding to a halt."[22] On January 16[,] 2004 Welch again issued a news release saying "Refusing to allow qualified jurists like Miguel Estrada, Priscilla Owen, Charles Pickering and others to ever have an up-or-down vote on the Senate floor is back room partisan politics at its worst."[23]

The issue was also used by candidates Darrow and Michel, as discussed in a November 18, 2003 article in the Milwaukee Journal Sentinel.[24] That article quotes

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[20] FEC opp. preliminary injunction exhibits 10 (dated 9/4/2003), 11 (dated 11/12/2003) and 12 (dated 11/14/2003).

[21] FEC opp. preliminary injunction exhibit 11.

[22] FEC opp. preliminary injunction exhibit 10.

[23] FEC opp. preliminary injunction exhibit 13, dated 1/16/2004.

[24] FEC opp. preliminary injunction exhibit 14.

State Republican Chairman Rick Graber saying Wisconsin Republicans are "very well aware of (the issue). It's something the Senate candidates (against Feingold) are talking about at every stop. I think talk radio is talking about it around the state.[25]

On March 5, 2004 Wisconsin Right to Life also linked the filibuster of President Bush's judicial nominees to the pro-life issue agenda and to Sen. Feingold:

> Plfaff also stressed the importance of defeating radically pro-abortion Russ Feingold in the U.S. Senate race. "No category of state or federal lawmaker has more influence on the fate of unborn babies than those individuals who are elected to serve in the United States Senate. Senators not only vote on legislation affecting the sanctity of human life but they have the power to confirm or not confirm the President's judicial nominations. And it is in the U.S. Supreme Court where the fate of *Roe* v. *Wade* will ultimately be decided. We do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees."[26]

The use of the judicial nominations issue was one of several issues raised in the campaign, but it was raised early and often as a partisan issue with the Republican candidates and Wisconsin Right to Life citing it as a reason to defeat Sen. Feingold.

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[25] FEC opp. preliminary injunction exhibit 14.

[26] WRTL News release quoting Bonnie Pfaff Wisconsin Right to Life Pac Chair. FEC opp. preliminary injunction exhibit 4, dated 3/5/2004.

5 Wisconsin Right to Life in Wisconsin Politics

Wisconsin Right to Life is a very active force in Wisconsin state politics. They routinely endorse candidates for both federal and state offices and are active in providing voter education and mobilization efforts on behalf of candidates. In the September 14, 2004 primary they endorsed 109 candidates, 4 Democrats and 105 Republicans.[27]

WRTL is particularly effective at voter contact and mobilization. Following the November 2, 2004 general election, WRTL issued a press release quoting Legislative/PAC director Susan Armacost as saying "Wisconsin Right to Life is disappointed that the President narrowly lost Wisconsin but we are comforted in knowing that we delivered the pro-life vote for this great man." The news release goes on to say "Wisconsin Right to Life and its chapters reached over one-half million households throughout Wisconsin with phone calls and mailings."[28] In a news released dated November 4, 2004, WRTL said "Wisconsin Right to Life is widely recognized as one of the most effective right to life organizations in the nation. During the past election cycle, the organization carried out extensive statewide activities on behalf of federal and state candidates. In addition, they carried out a number of other activities to bring their one-half million members and supporters to the polls on

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[27] FEC opp. preliminary injunction exhibit 5.

[28] Wisconsin Right to Life news release dated 11/3/2004. http://www.wrtl.org/News04/110304.pdfaccessed on the WRTL web site 5/27/2006.

election day to vote for Wisconsin Right to Life PAC-endorsed candidates."[29]

[29] WRTL news release dated 11/4/2004, http://www.wrtl.org/ News04/ 110404.

[Exhibit 3]

Exhibit A from Second Affidavit of Barbara L. Lyons
Exhibit 3

[Filed: June 23, 2006]

January 27, 2006

Filibuster Radio Ad: 60 Seconds

Some Senators are at it again. Threatening to filibuster qualified judicial nominees. This time, the stakes are even higher. They want to use the filibuster to block a vote on the nomination of Judge Samuel Alito for the U.S. Supreme Court.

Judge Alito has received the highest qualification rating for judicial nominees and deserves a simple "yes" or "no" vote to prevent gridlock in our judicial system.

Contact Senators Feingold and Kohl at 202-224-3121 and tell them to oppose the filibuster of Judge Samuel Alito for the U.S. Supreme Court. That's 202-224-3121.

Paid for by Wisconsin Right to Life, which is responsible for the content of this advertising and not authorized by any candidate or candidate's committe.

[Exhibit A]

Nos. 06-969 & 06-970

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC.,
Appellee.

SENATOR JOHN MCCAIN, *et al.*,
Appellants,

v.

WISCONSIN RIGHT TO LIFE, INC.,
Appellee.

On Appeals from the United States District Court for the District of Columbia

BRIEF *AMICUS CURIAE* ON BEHALF OF THE ALLIANCE FOR JUSTICE

MICHAEL B. TRISTER *
B. HOLLY SCHADLER
LICHTMAN, TRISTER & ROSS, PLLC
1666 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 328-1666
Counsel for Amicus

* Counsel of Record

March 23, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF *AMICUS* [1]

The Alliance for Justice ("AFJ") is a national association of environmental, civil rights, mental health, women's, children's and consumer advocacy organizations. These organizations and their members support legislative and regulatory measures that promote political participation, judicial independence and greater access to the public policymaking process. Most of AFJ's members are charitable organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code. A significant number, also work with or are affiliated with other types of nonprofit entities that promote their views not only through public education and legislative advocacy, but also in the electoral process.

AFJ works to increase the involvement of advocacy organizations in the policymaking process by helping them to understand and comply with the complex tax and election laws governing their activities through plain language guides, workshops and individualized technical assistance. AFJ also monitors legislative and regulatory activity impacting the ability of advocacy organization to operate in the policy arena. During debate on the Bipartisan Campaign Reform Act of 2002 ("BCRA"), we expressed deep concern that the law's broad provisions limiting "electioneering communications" would severely curtail legitimate communications addressing legislative and other policy issues. AFJ also appeared as *Amicus Curiae* when this case was previously before this Court.

On matters of public policy, AFJ consistently takes positions that sharply contrast with the positions of appellee in this case. Indeed, we have produced and disseminated broad-

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[1] Counsel for each party has consented to the filing of this Brief, as indicated by letters filed with the Clerk of the Court. No counsel for a party authored this Brief, in whole or in part. No person or entity other than *Amicus* made a monetary contribution to the preparation or submission of this Brief.

cast communications supporting the important role of the Senate in considering the President's nominees to the federal bench, including the limited use of filibusters in appropriate cases. Despite these profound policy differences, AFJ agrees with appellee that citizen organizations have a First Amendment right to advocate their views before the public without government interference, and we submit this Brief in order to urge the Court to make that right a reality in the critical area of grassroots advocacy.

STATEMENT

The Legal Framework of Advocacy Groups

Advocacy organizations such as *Amicus* and its members provide a critical means by which the voices of ordinary citizens across the political spectrum may be heard on vital policy and legislative issues. BCRA's restrictions on corporate and union expenditures for electioneering communications will severely limit this crucial role of advocacy organizations in our democracy unless this Court approves a constitutionally mandated exception for grassroots lobbying communications similar to the exception adopted by the district court.

1. **Permissible Lobbying Activities of Advocacy Organizations.** Advocacy organizations are generally organized as nonprofit corporations under state law and are recognized as exempt from federal taxation either as social welfare organizations under section 501(c)(4) of the Internal Revenue Code ("IRC") or charitable and educational organizations under IRC § 501(c)(3). Internal Revenue rules permit social welfare organizations to expend all of their resources on advocating for policy and legislative changes without limitation. *See* Rev. Rul. 71-350, 1971-2 C.B. 237. Advocacy organizations exempt as charities may spend unlimited amounts on public education involving policy issues but may only expend an insubstantial part of their resources on efforts to influence legislation. *See* IRC § 501(c)(3). In the Tax

Reform Act of 1976, Congress enacted IRC §§ 501(h) and 4911, under which charities, other than churches and private foundations, may alternatively elect to be subject to a set of dollar limitations on expenditures for lobbying activities. Pub. L. 94-455, 90 Stat. 1520, § 1307 (1976). The purpose of this legislation was to encourage charities to participate in the policymaking process by replacing the uncertain standards of prior law and eliminating the threat that charities which conduct excessive lobbying would lose their exemptions from federal tax. *See, e.g.*, Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1976*, 1976-3 C.B. (Vol. 2) 419-420.

As approved in this Court's decision in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) (*TWR*), many groups maintain both 501(c)(4) and 501(c)(3) organizations under a common umbrella, frequently sharing staff and other resources.[2] The 501(c)(4) entities in these multi-entity arrangements may maintain separate segregated funds to raise voluntary contributions to support partisan political activities without jeopardizing the tax exemptions of the related 501(c)(4) or 501(c)(3) organizations. *See generally*, Ward L. Thomas and Judith E. Kindell, "Affiliations Among Political, Lobbying and Educational Organizations," *in* IRS Exempt Organizations Division, Continuing Professional Education Technical Instruction Program for FY 2000, 255-266. These segregated funds may be registered as political action committees (PACs) under the Federal Election Campaign Act ("FECA") or state election laws; in some instances they are instead required to register and file periodic reports with the Internal Revenue Service. *See* IRC §§ 527(i) and (j). The activities of these separate segregated political action committees are not attributed to the fund's parent

[2] As the Court noted in *TWR*, the IRS requires "only that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying." 461 U.S. at 544 n.6.

nonprofit corporation for federal tax purposes. *See* IRC § 527(f)(3).

2. **The *MCFL* Exception and Its Narrow Implementation By The FEC.** In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), this Court recognized a constitutionally required exception to FECA's ban on corporate political expenditures for certain nonprofit corporations that "have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status." In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court read this exception into BCRA § 203's ban on corporate electioneering communications. 540 U.S. at 211. Unfortunately, this judicially crafted exception is of limited use in protecting legislative and policy advocacy by advocacy organizations in large part because of the very restrictive conditions imposed by the Federal Election Commission ("FEC") on its implementation.[3] The FEC regulation defines the term "qualified nonprofit corporation" as *inter alia* an organization whose "only express purpose is the promotion of political ideas," 11 C.F.R. § 114.10(c)(1) (2006), and which is organized for tax purposes only under IRC § 501(c)(4).[4] *Id.* at § 114.10(c)(5). The regulation also

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[3] IRC § 501(c)(4) organizations that conduct electioneering communications under the *MCFL/McConnell* exception also risk the imposition of federal taxes on these expenditures under IRC § 527(f). While the IRS has made clear that not all communications that fall within the scope of BCRA § 203 will be taxable, *see* Rev. Proc. 2004-06, 2004-6 I.R.B. 328, the vague "facts and circumstances" test which the IRS applies to make this determination leaves significant uncertainty as to its application to particular communications.

[4] The FEC initially promulgated a blanket exception to the definition of electioneering communications for communications by any IRC § 501(c)(3) organization. *See* Final Rules, "Electioneering Communications," 67 Fed. Reg. 65190, 65211, adopting 11 C.F.R. § 100.29(c)(6); *id.* at 65200. This exception, however, was invalidated on procedural grounds. *See Shays v. FEC*, 337 F.Supp.2d 28, 124-127 (D.D.C. 2004),

requires that a qualified nonprofit corporation be able to demonstrate from its accounting records that it does not directly or indirectly accept any donations or anything of value from business corporations or labor organizations, *id.* at § 114.10(c)(4)(ii), or have a written policy against accepting donations from business corporations or labor organizations. *Id.* at § 114.10(c)(4)(iii). Finally, a qualified nonprofit corporation may not engage in any business activities, *id.* at § 114.10(c)(2), and may not provide benefits to its members such as affinity credit cards, insurance policies or savings plans, training, education, or business information. *Id.* at § 114.10(c)(3)(ii)(A)-(B). The total ban on the receipt of any financial assistance from business corporations or labor organizations and the restriction on the kinds of benefits provided by many nonprofit organizations to their members has meant that only a handful of advocacy organizations may qualify under the FEC's regulation.

3. **BCRA's Treatment of Nonprofit Organizations.** Section 203(c)(2) of BCRA creates an exception to the ban on corporate electioneering communications for any broadcast communication by an IRC § 501(c)(4) organization if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals lawfully admitted for permanent residence. FECA § 316(c)(2). This exception, however, was nullified by BCRA § 204, the Wellstone Amendment. *See McConnell v. FEC*, 540 U.S. at 209 n. 90. BCRA, therefore, prohibits electioneering communications by all advocacy organizations unless they fall within the judicially-crafted exception for

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aff'd as to other issues, 414 F.3d 76 (D.C. Cir. 2005), and after initiating another rulemaking the FEC decided to eliminate the exception from the regulation. *See* Final Rules, "Electioneering Communications," 70 Fed. Reg. 75713, 75714 (Dec. 21, 2005). Thus, 501(c)(3) organizations remain subject to BCRA § 203 on the same terms as for-profit businesses and other nonprofit organizations, and without even the limited benefit of the *MCFL* exception.

MCFL/McConnell-type organizations as narrowly implemented by the FEC.

4. **The FEC's Failure to Act to Protect Grassroots Lobbying.** In *Wisconsin Right To Life v. FEC*, 546 U.S. 410, 126 S.Ct. 1016 (2006) ("*WRTL I*"), the Court specifically noted that "the FEC has statutory authority to exempt by regulation certain communications from BCRA's prohibition on electioneering communications." 126 S.Ct. at 1017 (citing 2 U.S.C. § 434(f)(3)(B)(iv)). Following the Court's decision, *Amicus* joined with other advocacy, labor and business organizations in submitting a petition for rulemaking requesting the FEC to promulgate an exception to the regulatory definition of electioneering communications for certain grassroots lobbying communications. The Commission refused to act on this petition, however, leaving the development of rules in this area to individual enforcement cases as they arise. *See* Notice of Disposition of Petition for Rulemaking, "Exception for Certain 'Grassroots Lobbying' Communications From the Definition of 'Electioneering Communication,'" 71 Fed. Reg. 52295 (Sept. 5, 2006) ("Notice of Disposition. . ."). Thus, although the issues presented in this case arise in the context of an affirmative pre-enforcement judicial challenge, the principles announced by the Court could have their most important application, not in judicial proceedings, which are too costly for many nonprofit organizations to undertake, but in administrative enforcement proceedings brought after broadcast communications have been disseminated.

SUMMARY OF ARGUMENT

The FEC and Intervenors do not question this Court's holding in *WRTL I* that as-applied challenges to the constitutionality of BCRA § 203 are permissible. The FEC also recognizes that as-applied challenges should not require examination of all facts that are potentially relevant to the ascertainment of a broadcast advertisements purpose or

effect, since such an inquiry could not feasibly be administered under the time constraints of pre-election litigation. The approach offered by the FEC and Intervenors, however, would have the effect of nullifying the right to bring as-applied challenges recognized in *WRTL I* and would require the same kind of "unstructured post hoc inquiry" which the FEC claims to eschew.

1. Contrary to the FEC's argument, the district court did not adopt a rigid set of requirements for pre-election advertisements that would in all cases lead to a finding of unconstitutionality. The court instead identified those undisputed facts in the record of this case which, taken as a whole, persuaded it that the grassroots lobbying ads disseminated by WRTL did not have an electioneering purpose or effect.

While the FEC offers no test of its own as a substitute for the district court's approach, Intervenors offer a test under which the only significant element would be whether a broadcast communication takes a "critical stance" as to an issue. Intervenors' proposed test fails to clarify a number of important issues. They also do not explain how their "critical stance" rubric differs from the "promote, attack, support or oppose" ("PASO") formula which the district court considered as one of the elements in its review of the WRTL ads. Finally, if Intervenors' proposal allows a lower threshold of proof than the PASO test, it runs counter to Congress' own determination when it enacted a back-up definition of electioneering communications to be applied in the event that BCRA's primary definition was struck down as facially invalid; and, contrary to Intervenors' argument, the district court's approach is not inconsistent with this Court's decision in *McConnell*.

2. The district court also did not improperly place the burden of proof on the FEC. This Court's First Amendment jurisprudence makes clear that the burden of proving that speech restrictions serve compelling governmental interests

"rests on the censor." While the Court has suggested in certain campaign-finance cases that the person claiming an exemption from FECA's prohibitions has the burden of *production* as to facts which are in the claimant's exclusive possession, it has never shifted the ultimate burden of *persuasion* away from the government. It is also erroneous to contend, as the FEC does, that the Court's decision upholding the facial constitutionality of BCRA § 203 creates a presumption that all broadcast ads run during BCRA's 30/60 day periods are constitutional.

3. The district court correctly considered as relevant to its constitutional determination the fact that WRTL's ads did not mention an election, a candidate or a political party, and did not comment on a candidate's character, actions or fitness for office. These aspects of the ads were clearly relevant to whether the ads had an electioneering purpose. If relying on the fact that broadcast ads focus on issues rather than elections or candidates is improper, as the FEC contends, then virtually no grassroots lobbying communications would be constitutionally protected.

4. The district court also did not err in refusing to consider the attenuated contextual evidence proffered by the FEC and the Intervenors. The fact that the WRTL ads did not provide an address or other means by which Wisconsin citizens could contact their two Senators with respect to the filibuster issue hardly shows that the ads had an electioneering purpose, given the ready availability of such contact information to any member of the public. The district court's refusal to consider the partisan content of WRTL's website referenced in the ads also was not erroneous considering the FEC's own recent determination that because of the Internet's unique features it "warrants a restrained regulatory approach," and because of the many practical problems that such consideration would face. A particular problem is presented by the fact that many advocacy organizations include content on their websites that is paid for and identified as having

come from their connected political action committees (PACs) which would undercut Congress' determination in FECA and in the Tax Code that such funds should be treated as separate entities and that their activities therefore should not be attributed to the parent entity.

The district court also did not err in rejecting the "timing" evidence relied on by the FEC and Intervenors. The fact that ads were run within the 60-day period prior to the 2004 general election cannot be determinative, since this would nullify the as-applied challenge for all broadcast communications that fall within BCRA's definition of electioneering communications. The specific timing of the ads is also not dispositive because it may equally reflect the legislative calendar as the electoral calendar, and the fact that Congress was not in session when the WRTL ads were run could be equally explained by the fact that members of Congress are more likely to be reachable in their home states when the Senate is not in session. The point here is not that the timing evidence relied on by the FEC and Intervenors has no possible relevance in determining the purpose of ads, but that the import of such evidence is highly disputable, thereby leading to the very kinds of protracted factual inquiries which the FEC agrees are not appropriate in this area of constitutional law.

Finally, the district court did not err in refusing to find that the evidence of WRTL's other lobbying and political activities demonstrated an electioneering purpose for its broadcast advertisements. Opening as-applied challenges to a full-scale inquiry into an organizations lobbying and political activities will defeat the goal of limiting such inquiries in the First Amendment context, and such sweeping investigations will have a deterrent effect on the associational and speech rights of advocacy organizations, as this Court has recognized. Attributing the partisan purposes of the WRTL PAC to WRTL's separate IRC § 501(c)(4) entity would undercut the carefully balanced statutory scheme for corporate political activity designed by Congress, and is inconsistent with this

Court's reliance on the availability of PACs to conduct electioneering communications in *McConnell.*

5. Finally, the Court should reject the Intervenors' contention that the availability of the PAC and *MCFL* options should have been considered by the district court. The availability of the *MCFL* option has been severely curtailed by restrictive FEC regulations which deny the exemption to all IRC § 501(c)(3) organizations, deny IRC § 501(c)(4) organizations the opportunity of accepting even a *de minimis* amount, or a small percentage, of their support from businesses or labor unions, and prohibit nonprofits from engaging in certain ancillary business activities such as credit cards, insurance or training which are frequently an important source of their revenue. Groups which attempt to conduct grassroots lobbying through the so-called PAC option also risk the imposition of significant taxes by the Internal Revenue Service. And court's cannot make determinations as to whether the *MCFL* or PAC options are viable for a particular organization without undertaking difficult factual determinations which are not within the competence of federal judges to make. The Court's reliance on the PAC option in upholding BCRA § 203 against a facial challenge on grounds of overbreadth also does not support reliance on the PAC or *MCFL* options in determining an as-applied challenge. The purpose and effect of specific grassroots lobbying communications remains the same whether they are paid for by a PAC or *MCFL* organization or by the general treasury funds of an IRC § 501(c)(4) organization.

ARGUMENT

The district court correctly understood this Court's remand order in *WRTL I* as a "tacit acknowledgment that, notwithstanding the virtues of a bright line test, there may nonetheless be some ads that are unconstitutionally captured by BCRA section 203." J.S. App. 28a. The FEC does not

question this conclusion.[5] *See* Brief of Appellant Federal Election Commission in Nos. 06-969 and 06-970, 49 (hereinafter "FEC Brief. . . ."). The agency further acknowledges that the constitutional test for as-applied challenges should not "require[] examination of *all* facts that are potentially relevant to the ascertainment of an advertisement's purpose or effect," since such an inquiry "could not feasibly be administered, especially under the time constraints of expedited pre-election litigation." FEC Brief at 27. Similarly, the agency concedes that "potential speakers may indeed be chilled if the legality of particular communications or financing arrangements turns on an unstructured post hoc inquiry into the speaker's likely intent." FEC Brief at 42. While we endorse these sentiments wholeheartedly from the standpoint of the regulated advocacy community, we disagree with the approach which the FEC and Intervenors urge this Court to adopt in its place.

I. The District Court Properly Avoided Adopting An Absolute Test To Define All Broadcast Communications Protected By The First Amendment. In Contrast, Intervenors' Proposed Constitutional Test Would Nullify The Protection Afforded By The Constitution To Legitimate Legislative and Policy Advocacy.

A careful reading of the majority opinion makes clear that the district court did not "identif[y] only those advertisements that are *most obviously* election-related, and effectively [hold] BCRA § 203 unconstitutional as applied to all other 'electioneering communications.'" FEC Brief at 28. In a case of first impression, it would not have been appropriate for the district court to announce a hard and fast test applicable to all

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[5] Appellant-Intervenors also do not expressly question this conclusion, although, the narrow view they take of the First Amendment's application to such cases would effectively eviscerate the Court's earlier decision in this case.

as-applied challenges to BCRA § 203 or to define a category of ads which would always be protected. The court instead identified those specific facts which, taken as a whole, persuaded it on the record presented that the WRTL grassroots lobbying ads did not have the required electioneering purpose or effect. J.S. App. 22a-25a. Whether other facts, or a different combination of facts, should produce the same constitutional result was not and could not be decided in this initial effort following *WRTL I*.[6]

While the FEC takes issue with the district court's approach, the FEC offers no as-applied constitutional test of its own. Intervenors, on the other hand, put forward a test which would effectively nullify the Court's decision in *WRTL I* by limiting the availability of as-applied challenges to rare cases of no significance to legislative and other policy advocacy.[7] According to Intervenors, in considering WRTL's as-applied challenge, the Court "need look no further" then the fact that the judicial filibuster advertisements (i) were run immediately before the election, (ii) "took a critical stand regarding a position on an issue," and (iii) referred to a candidate by name. *See* Intervenors' Brief at 22-24. Since the first and third of these elements would apply to every broadcast communication that fits within BCRA's definition of electioneer-

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[6] The FEC and Intervenors are wrong, therefore, in suggesting that under the district court's approach any advertisement which merely includes a reference to a pending legislative matter would be exempt from regulation regardless of the other factors considered by the district court. *See* FEC Brief at 26; Brief of Appellant in No. 06-970 ("Intervenors' Brief ...."), 32 n.22.

[7] Intervenors give several examples of the kinds of broadcast communications that "might" be protected by the First Amendment because they are "truly different in kind from the type of advertising that prompted Congress to enact BCRA's restriction and that Congress has a compelling interest in regulating." Intervenors' Brief at 40 n.27. While Intervenors deserve some credit for their imagination, their examples, all of which relate to commercial and other similar activities, demonstrate what little impact the First Amendment would have under their test.

ing communications,[8] the only real substance to Intervenors' proposed constitutional test is the "critical stance" element. There are a number of difficulties with this position.

First, it is unclear whether Intervenors would apply their test to advertisements which take a "critical stance" on a candidate's position regarding any legislative or policy issue, or just to those issues that are an issue of contention in the campaign. *Compare* Intervenors' Brief at 10, 14, *with id.* at 23. If the "critical stance" test is limited to issues in the campaign, then district courts will have the near impossible task of reviewing candidates' speeches, advertisements and position papers, the activities of political parties and independent political groups, and media coverage of the campaign to determine which policies have become significant in the campaign. On the other hand, if the "critical stance" element of Intervenors' proposed test refers to *any* matter of public policy on which a candidate has taken or might take a position, the likelihood is much less that the advertisements in issue would have an impact in the election, and the test would have a far greater impact in limiting legitimate legislative and policy advocacy.

Second, although Intervenors appear to believe that there is a recognizable difference between communications which are merely "critical" of a candidate and those which "promote, support, attack or oppose" (PASO) a candidate, as articulated by the district court, *see* Intervenors' Brief at 35, they make no attempt to explain this difference in any way which would be helpful to the lower courts, the FEC, or the regulated community. Intervenors' "critical stance" test would intro-

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[8] This would not be true as to the first element if Intervenors mean the word "immediately" to apply only to broadcast communications made late in the 30/60 day BCRA periods, rather than to communications made throughout those periods. There is no such suggestion in their brief, however, and they also fail to make clear how courts should decide whether advertising is close enough to an election to be regulated.

duce a new level of vagueness[9] which can only serve to deter advocacy organizations from engaging in legitimate legislative and policy advocacy in the periods preceding elections. Further, in adopting the PASO language as a backup definition of electioneering communications in case BCRA's primary definition was found to be facially unconstitutional, *see* FECA § 304(f)(3)(A)(ii), Congress defined the level of critical comment which it believed should be used to protect against the sham issue ads with which it was concerned. To the extent that Intervenors suggest that issue ads may be regulated if they reach a lower threshold of criticism than is required under the PASO test, their argument runs counter to this Congressional determination.

Third, the district court's approach is not inconsistent with this Court's decision in *McConnell*. *See* Intervenors' Brief at 32-34. The "magic words" test relied on the absence of a very limited number of specific words to define protected speech. *See, e.g., McConnell*, 540 U.S. at 191. In contrast, the district court in this case considered the entire content of the WRTL ads. While the court did rely on the absence of words attacking Senator Feingold's character, qualifications

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[9] Because the district court found that WRTL's ads did not violate the PASO standard, the Court need not determine in this case whether a more clear standard than PASO would better serve the First Amendment interests at stake in as-applied cases. The petition for rulemaking submitted to the FEC by *Amicus* and other groups urged the agency to adopt a standard, which, while very similar in other respects to the approach followed by the district court, replaced the PASO standard with a requirement that "[i]f the communication discusses the candidate's position on record on the matter, it does so only by quoting the candidate's own public statements or reciting the candidate's official action, such as a vote, on the matter.") Notice of Disposition, 71 Fed. Reg. at 52295. For the same reason, this is not an appropriate case for the Court to decide whether the PASO standard is unconstitutionally vague as applied to advocacy organizations' pre-election broadcast communications. *Cf. McConnell*, 540 U.S. at 170 n. 64 (holding that the PASO standard is not unconstitutionally vague as applied to political party committees).

or fitness for office, it did not, as Intervenors suggest, *require* the presence of such words as a precondition for regulation, as its reliance on the PASO test and other elements shows.

Finally, there is no basis for Intervenors' unsubstantiated contention that the district court's approach will "invite wholesale circumvention of the campaign-finance laws." Intervenors' Brief at 36. The district court required a reference to a pending legislative matter as a first step in identifying "genuine" issue ads because an advertisement which does not include such a reference is highly unlikely to have a nonelectioneering purpose. The court did not stop there, however. Thus, an advertisement which attacks a candidate for her prior votes or public statements on a legislative issue still may violate the PASO element of the district court's approach.[10]

II. The Burden of Proof In This Case, As In All First Amendment Cases, Was on the FEC.

The district court also did not, as the FEC argues,[11] improperly "place[ ] upon the government the burden of establishing that the three advertisements implicate the concerns that BCRA § 203 is intended to address, rather than requiring appellee to demonstrate its constitutional entitlement to an exemption from a facially valid law." FEC Brief at 28. This argument is contrary to numerous previous pronouncements of this Court regarding the burden of proof in First Amendment cases.

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[10] There is no merit to Intervenors' argument that the reference in the WRTL ads to the actions of a "group of Senators" was a clear critical reference to Senator Feingold's prior position regarding judicial filibusters. *See* Intervenors' Brief at 38. This was a question of fact to be decided by the district court, whose determination was well within its discretion given that the burden of persuasion was on the FEC in this case. *See infra* pp. 15-18.

[11] Intervenors also appear to place the burden of persuasion on plaintiffs in as-applied cases. *See* Intervenors' Brief at 39.

In *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965), for example, the Court held unconstitutional a state statute requiring registration as a member of a Communist-front organization where the organization had been officially cited or identified as such by the Attorney General of the United States or other federal agencies. The Court held that the state statute unconstitutionally provided that the federal designations were "presumptive evidence" that the organization was a covered organization under the state provision, thus "cast[ing] an impermissible burden upon the appellants to show that the organizations are not Communist fronts." 380 U.S. at 496. The Court in *Dombrowski* relied on its earlier decision in *Speiser v. Randall*, 357 U.S. 513, 526 (1958), where it had held unconstitutional a state's imposition on a taxpayer of the burden of persuasion as to his eligibility for a tax exemption; taxpayers who signed an oath disclaiming advocacy of the unlawful overthrow of the government were deemed eligible for the exemption, while taxpayers who refused to sign such an oath were required to demonstrate their eligibility. As later quoted in *Dombrowski*, the Court stated: "Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech." *See Consolidated Edison Company v. Public Service* Com'n, 447 U.S. 530, 540 (1980) ("Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest."; *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) ("Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, . . . 'the burden is on the Government to show the existence of [a compelling] interest.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 362 (1976); additional internal citations omitted); *Healy v. James*, 408 U.S. 169, 184 (1972) ("heavy burden rests on

the [state] to demonstrate the appropriateness of its action."; *Freedman v. State of Maryland*, 380 U.S. 51, 58 (1965) ("the burden of proving that the film is unprotected expression must rest on the censor.")

The as-applied campaign finance decisions relied on by the government do not establish a different rule. These cases at most suggest that in some circumstances a party claiming the benefit of a constitutional exemption from FECA's requirements has the burden of *production* with respect to facts that are within its exclusive knowledge or possession; the Court did not address the very different question of the ultimate burden of *persuasion*.[12] *Cf. Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). "When the evi-

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[12] In *Buckley v. Valeo*, the Court refused to grant a blanket constitutional exemption from FECA's reporting requirements for all minor political parties, holding instead that a minor party is entitled to an exemption only where there is "a substantial threat of harassment." 424 U.S. at 72-74. While the Court suggested that the minor party had the burden of production on this issue, it recognized, "that unduly strict requirements of proof could impose a heavy burden," *id.* at 74, and that "[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim." *Id.* The Court later affirmed these sentiments when it considered an as-applied challenge to analogous state reporting requirements filed by a minor party. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 93-94 (1982). Rejecting an "unduly narrow view of the minor-party exemption" urged by the state, 459 U.S. at 94-98, the Court considered the evidence of harassment offered by the minor party and concluded that it met the test. *Id.* at 98-101. At the very most, the Court's opinion placed the burden of *production* on the minor party seeking exemption, an unexceptional conclusion considering that it is the party who had access to evidence of harassment. The Court's opinion did not, however, discuss which party had the burden of persuasion in the event that the evidence was disputed.

The Court's opinion in *MCFL* also does not support the FEC's position here. While it stands to reason that an advocacy organization claiming exemption from FECA would have the burden of production with respect to the corporate characteristics outlined by the Court, the Court never placed the burden of *persuasion* on the organization claiming the exemption. *See* 479 U.S. at 263-264.

dence is ambiguous," however, "[i]n the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S.767, 776, 777 (1986).

In accordance with the Court's overbreadth jurisprudence, the only issue decided in *McConnell* was whether the plaintiffs had "carried their heavy burden of proving" that the statute covered a "substantial" amount of protected speech. *See* 540 U.S. at 207. The *McConnell* plaintiffs' failure in demonstrating a sufficient *quantity* of improperly covered communications is irrelevant in considering whether regulation of a specific communication is justified by the appropriate governmental interests.

Finally, the fact that the constitutional validity of WRTL's filibuster advertisements arises in a pre-election affirmative challenge also should not shift the burden of proof to the organization seeking to protect its right to speak. If an as-applied constitutional issue arises in a civil enforcement action brought by the FEC, the burden would be on the agency to demonstrate not only that the advertisements fall within the statutory prohibition on electioneering communications, but also that the ads are constitutionally subject to regulation. *See, e.g., Colorado Republican Campaign Comm. v. FEC*, 518 U.S. 604 (1996). Similarly, if the issue arises in a criminal case, the burden would surely be on the government to show that the ads are of a kind that may be regulated without violating the First Amendment.

III. The Elements of WRTL's Advertisements Relied On By The District Court Helped To Demonstrate That The Advertisements Did Not Have An Electioneering Purpose or Effect.

The FEC contends that the factual elements on which the district court relied are overly broad and would, if applied

in all cases, effectively evicerate BCRA § 203 itself. For example, the FEC objects to the district court's reliance on the fact that "'the language in [WRTL's] advertisements does not mention an election, a candidate, or a political party, nor do they comment on a candidate's character, actions, or fitness for office.'" FEC Brief at 29, quoting J.S.App. 23a. Since references to an election or a federal official's status as a candidate confirm that an advertisement covered by BCRA § 203 has an electioneering purpose, the absence of such references is some evidence that the ads do not have such a purpose. Similarly, since comments on a candidate's character, actions, or fitness for office is at least suggestive of an electioneering, rather than an issue-related, purpose, the absence of such language may equally be indicative of a nonelectioneering, issue-directed purpose. If these elements of the WRTL ads are irrelevant, however, no as-applied challenge to BCRA § 203 could ever succeed, for it is the essence of genuine grassroots lobbying ads that they focus on legislative and policy issues rather than the election.

IV. The District Court Did Not Err In Refusing To Consider The Attenuated Contextual Evidence Proffered By The FEC and Intervenors.

The FEC also argues that the district court erred in refusing "to consider highly probative evidence outside the 'four corners' of the 2004 advertisements." FEC Brief at 38. Intervenors take the same position. Intervenors' Brief at 24-28. The district court, however, did not err when it failed to give weight to the "contextual" evidence relied on by the FEC and Intervenors.[13]

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[13] The extent to which the FEC's and Intervenors' position would open up expansive factual inquiries in as-applied cases is demonstrated by the wide range of contextual evidence that could be relevant in as-applied cases. In the lower court, for example, the FEC proposed 17 separate findings of fact covering three full pages under the heading "The 2004 Wisconsin Senate Election Was Expected to Be Competitive, and Judicial Filibusters Were a Campaign Issue." Joint Appendix (J.A.), 17-20. Allow-

A. The FEC and Intervenors make much of the fact that, while the WRTL ads asked viewers and listeners to contact Senators Kohl and Feingold and urge them to oppose the filibuster of judicial nominees, the ads did not provide an email address or other contact information for either official. Given the ready access of such information on the Internet and through many other means, the absence of such information, does not in any way demonstrate that WRTL's interest in the judicial filibuster issue was a pretext for an electioneering message. There is also no merit in the FEC's argument that the district court should have considered the content of the organization's website as probative evidence regarding the purpose of the ads. FEC Brief at 43-44, 45. Consideration of the content of a website, even one that is expressly referenced in an advertisement, runs the risk of interfering with, as the FEC itself has recognized, "a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach." Final Rules, "Internet Communications," 71 Fed. Reg. 18589 (Apr. 12, 2006).

The FEC's argument also would present substantial practical difficulties. Many advocacy organizations' websites include hundreds, if not thousands, of pages and include links to numerous other organizations' sites. Moreover, an organization's website frequently changes on a daily or even hourly

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ing courts to delve into the strength of a candidate's opposition in a particular election or what issues have become of significance in a campaign, however, is a highly uncertain inquiry which poses serious issues of judicial administration and could deter organizations from undertaking legitimate issue advertising in uncertain cases. Similarly, it easily could be disputed whether broadcast advertisements run before national political party conventions have the purpose or effect of influencing delegates' votes, which are predetermined by the primary process. While it might be argued that such pre-convention ads are instead directed at the up-coming general election, this too would require an expansive factual inquiry to resolve.

basis, and in the case of blogs there may be numerous contributors to the content of a website. Consideration of the content of an advocacy organization's website would thus open up precisely the kind of "unstructured post hoc inquiry into the speaker's likely intent" that the FEC itself recognizes is not appropriate where constitutional rights of expression and association are involved. *See* FEC Brief at 42.

Many advocacy organizations include on a single website material that reflects the activities of all of its related entities, including, for example, the endorsements of their related PACs. The PAC communications must be identified as such, *see* 11 C.F.R. § 110.11(a)(1); and the PAC must pay all of the costs associated with its portion of the website. A court seeking to determine the purpose of a broadcast communication by looking to the sponsor's website would, therefore, have to engage in the virtually impossible task of determining whether, in spite of these conditions, a PAC's messages were sufficiently separate from the rest of the site. Moreover, as discussed *infra*, pp. 25-26, Congress determined that related PACs are to be treated as separate from their sponsoring organizations and their activities should not be attributed to the sponsoring organizations for legal purposes. Thus, the FEC's argument would upset the carefully-balanced structure of corporate, union and nonprofit electoral activity crafted by Congress.

B. The FEC and Intervenors also argue that the district court erred in not considering certain evidence with respect to the timing of the advertisements: (i) that the Senate did not have any judicial cloture votes after WRTL began runnings its ads; (ii) that the Senate was not in session when the ads were run, and (iii) that WRTL did not run any further filibuster ads in 2004 or 2005. FEC Brief at 45-47; Intervenors' Brief at 27-28. Had this evidence been considered, the government argues, it would have demonstrated that the advertising campaign was intended "to coincide with the electoral schedule, and that the pre-election timing was not

simply fortuitous." *Id.* at 46. The district court did, however, take into account the fact that the ads "describe[d] an issue that had been, and was likely to be an ongoing issue of legislative concern in the Senate," J.S.App. 23a, and its refusal to delve further into this issue was justified by a number of considerations.

The timing of ads during the periods prior to primary and general elections cannot automatically disqualify them from constitutional protection, since by definition BCRA § 203 applies only to broadcast communications that are run in the 30/60 day periods prior to elections. While it may be marginally relevant whether ads were run early or late in the statutory periods, this fact too is not always dispositive in demonstrating an electioneering purpose. The specific timing of an advertising campaign may reflect the legislative calendar as much as the electoral calendar,[14] since numerous legislative issues come to a head in Congress during the periods prior to primary and general elections.[15] The fact that

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[14] In the district court, the FEC offered as proposed findings of fact its contentions that "scheduling of the judicial filibuster votes that occurred before the recess was largely for the particular purpose of mobilizing voters in the election," and that "judicial filibuster votes were scheduled in order to mobilize conservative voters in the fall election." Defendant Federal Election Commission's Proposed Findings of Fact, Nos. 75, 77, at J.A. 31. One can only wonder at the breadth of discovery and testimony which would be necessary before a court could make reliable findings on questions of fact as complicated as these.

[15] In its Brief when this case was previously before the Court, *Amicus* showed that the 60-day period prior to general elections is frequently a period of intense legislative activity. For example, between September 4 and Election Day 2004, over 100 roll call votes were taken in the U.S. House of Representatives and nearly 50 roll call votes occurred in the U.S. Senate. These votes involved numerous significant issues, including welfare reform, a constitutional amendment on marriage, tort reform, and Department of Defense and other agency appropriations. *See* Brief of Alliance For Justice As *Amicus Curiae* In Support of Appellant in No. 04-1581 (O.T. 2005), 13.

Congress was not in session when the WRTL ads were run could merely suggest an intent to reach the public during the very period when Senators were likely to be in their home states; or, it may reflect the fact that the organization was unable to raise sufficient funds to support its advertisements until the pre-election period.

An organization also may have numerous non-political reasons for failing to disseminate similar ads after an election, including the fact that it may have exhausted its available funds on the first round of ads or that other more pressing issues may have arisen. Nor can it be argued that in order to be allowed to disseminate legislative and policy communications in pre-election periods, an advocacy organization must demonstrate that it will run similar advertisements when the issue arises in the future. In a typical case,[16] an organization will have made no decision regarding future advertising at the time that the issue arises in an as-applied case, and it would be speculative at best to engage in an inquiry into its future plans.

The point is not that the timing evidence on which appellants rely can never be indicative of an electioneering purpose or effect; the point is that such evidence may reasonably be disputed by an organization in a particular case, as it was here. Given the debatable and disputable nature of any inferences which might have been drawn from the timing of WRTL's advertisements, the district court would have had to conduct a full-blown evidentiary inquiry[17] in order to make

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[16] Because of the prior appeal to this Court, evidence was uniquely available regarding WRTL's post-election activity concerning the judicial filibuster issue.

[17] This inquiry may not be limited to the organization's testimony; it may also be necessary to take evidence from the outside consultants who designed and produced the advertisements. In this case, for example, the FEC took the deposition of the consultant at WRTL's advertising agency who coordinated the organization's ads, and the agency obtained production of the consultant's handwritten working papers and other documents pertaining to his work. *See* Defendant Federal Election Commission's

reliable findings as to the actual reasons for the timing of the WRTL ads. The FEC agrees that such an inquiry is not generally appropriate in an as-applied constitutional challenge to BCRA § 203,[18] and it was not necessary or appropriate here.

C. The FEC finally argues that the district court erred in failing to consider WRTL's "pattern of electoral advocacy during the 2004 campaign,"[19] FEC Brief at 48, including evidence concerning the organization's prior lobbying activities and the partisan political activities of its PAC. The FEC's reliance on this "contextual" evidence is impracticable and inappropriate for several distinct reasons.

First, opening as-applied constitutional challenges to a full-scale inquiry into an organization's previous or contemporaneous lobbying and political activities will defeat the goal of limiting such inquiries which the FEC itself acknowl-

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Proposed Findings of Fact, Nos. 54, 61, at J.A. 26, 28. For larger organizations with more money to spend, of course, there could be more than one consultant whose testimony might be deemed relevant.

[18] Intervenors do not appear to agree with the FEC on this point, arguing instead that the factual inquiry presented in these cases is no different than the issues presented in any preliminary injunction hearing decided on an expedited basis. Intervenors' Brief at 38. In this very case, however, although this Court entered its remand Order in *WRTL I* on February 27, 2006, it was not until September 1, 2006, more than five months later, that the parties submitted their filings in support of the cross-motions for summary judgment. *See* District Court Docket Entries, J.A. 9. This long delay presumably was due to the broad scope of discovery engaged in by the FEC and Intervenors.

[19] Taking this reasoning to even more specious heights, Intervenors rely on the actions and comments of the Wisconsin Republican Party, Republican candidates in Wisconsin and even Vice-President Chaney to show the electioneering purpose of WRTL's advertisements. Intervenors' Brief at 25-27. The fact that the filibuster issue was raised by Senator Feingold's opponents in a partisan manner does not show that WRTL's own nonpartisan communications had the purpose or effect of influencing the election, rather than influencing the Senator's future position on a continuing issue of great public importance.

edges is key to protecting First Amendment rights. This type of sweeping inquiry by a government agency into the methods and tactics of advocacy organizations could have a devastating impact on the associational and speech rights of the organizations and their members. *See, e.g., Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963); *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (Frankfurter, J. concurring). And, the fact that an advocacy organization has opposed an incumbent Senator's legislative actions, even strenuously and continuously, should not be used to demonstrate that its pre-election advertisements have an election-influencing purpose, for advocacy organizations would then either have to avoid mentioning the names of incumbent representatives as part of their lobbying communications or take the risk that negative inferences might later be drawn from their work.

Second, the FEC's reliance on the lawful political activities of the WRTL PAC, is at odds with this Court's conclusion that the activities of a separate segregated fund should not be attributed to the parent organization for legal purposes, as long as there is strict segregation of the fund's monies from the organization's general treasury funds. *See Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 414-416 (1972). The scheme outlined by the Court in *Pipefitters* was carried forward for both unions and corporations, including nonprofit corporations such as WRTL, in FECA. *See* § 316(b)(2)(C). And, in *McConnell* this Court specifically relied upon the ability of advocacy organizations "to organize and administer segregated funds, or PACs," for the purpose of carrying out electioneering communications in upholding the facial constitutionality of the very provision in issue here. 540 U.S. at 204. The FEC's and Intervenors' reliance on the political endorsements and other partisan communications of WRTL's separate PAC thus is contrary to Congress' intention that a PAC's activities should not be attributed to its parent corporation or union and would, if adopted by this Court,

upset FECA and BCRA's carefully constructed balance in the area of corporate and union political activity.

Since this Court's decision in *Regan v. Taxation With Representation of Washington, supra,* modern advocacy organizations have become adept at operating through related multiple organizations each subject to its own legal requirements and limitations. Organizations may carry out partisan political activities through their PAC to the full extent permitted under the law while simultaneously conducting legitimate lobbying activities through their IRC § 501(c)(4) or § 501(c)(3) arms. There is no reason why the political purposes of one set of activities must necessarily taint the nonpolitical activities of a related organization. Moreover, the FEC's and Intervenors' position would force groups to choose between conducting lawful partisan political activities through their PACs or engaging in non-political lobbying communications during the periods when both types of activities are most crucial and most effective. This is contrary to the expressed intention of the sponsors and supporters of BCRA § 203, who made clear that the restriction on corporate electioneering communications would not interfere with lobbying and public policy advocacy. *See, e.g.*, 147 Cong. Rec. S2846 (daily ed. Mar.26, 2001) (Sen. Wellstone); *id.* at S2813 (daily ed. Mar. 23, 2001) (Sen. Jeffords) *id.* at S2458 (daily ed. Mar. 19, 2001)(Sen. Snowe).

V. The Availability of the PAC and *MCFL* Options Is Not Relevant In This As-Applied Challenge.

The Intervenor-defendants argue that in deciding this as-applied challenge the district court should have considered the availability to WRTL of two options other than using its general treasury funds for disseminating its broadcast communications: paying for the ads through its PAC or qualifying as an *MCFL* organization by refusing to take business contributions. Intervenors' Brief at 13, 15, 29-31. The gov-

ernment does not appear to rely on this argument, which should be rejected for a number of reasons.[20]

First, the *MCFL* exception is not a viable option for many advocacy organizations because of the restricted manner in which the FEC has implemented the exception. Because the FEC regulation denies qualified nonprofit corporation ("QNC") status to an advocacy organization if it receives *any* contributions from business or labor, 11 C.F.R. § 114.10(c)(4)(ii), advocacy organizations must refuse to accept even a *de minimis* amount, or a small percentage, of their financial support from business or labor, even though there is no real threat that these organizations would act as "conduits" for their donors' interests.[21] Furthermore, as dis-

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[20] Intervenors' alternative argument, Intervenors' Brief at 31, that advocacy organizations can simply avoid BCRA § 203 by not mentioning the names of federal candidates in their pre-election broadcast communications suffers from the same weaknesses. First, this view would effectively nullify the right to bring as-applied challenges allowed in *WRTL I* because it would always be the case that a speaker could change its message to fall outside of the statute. Second, Intervenors' argument ignores the fact that referring to specific incumbent legislators by name is regarded by most advocacy organizations as the most effective means of conducting grassroots lobbying. *See McConnell,* 251 F. Supp. 2d 156, 794 (Leon, J.) (citing testimony of National Association of Manufacturers and AFL-CIO). Third, if courts must determine whether mentioning a candidate by name adds to the efficacy of particular advertisements, hearings in as-applied challenges will turn into a battle of competing experts, with each side relying on the opinions of its own political consultants to show how best to influence the public with a particular lobbying message. In this case, for example, the FEC proffered evidence that *other* organizations concerned with the judicial filibuster and other issues ran ads outside of BCRA's 60-day period which did not mention the names of specific candidates. FEC Proposed Findings, Nos. 140-146, at J.A. 45-56. The depth of inquiry which would be necessary to explore the inferences which the FEC sought to draw from these facts is simply mind-boggling.

[21] *See FEC v. National Rifle Association,* 254 F. 3d 173, 191-93 (D.C.Cir.2001); *FEC v. Survival Education Fund, Inc.,* 65 F.3d 285, 292-94 (2d Cir. 1995). *See also North Carolina Right To Life, Inc. v. Bartlett,*

cussed *supra* at pp. 4-5, the FEC regulation contains other important restrictions on eligibility for the *MCFL/McConnell* exception, including excluding IRC § 501(c)(3) organizations and prohibiting organizations from providing the kinds of ancillary benefits, such as credit cards or insurance, that have become a common and important source of revenue in the nonprofit sector.

Second, as a matter of federal tax law, the PAC option is not available to an advocacy organization whose broadcast communications do not have an electoral purpose. In order to qualify for tax exemption under IRC § 527, the Tax Code provision applicable to political organizations such as PACs, an advocacy organization must be organized and operated for "the purpose of directly or indirectly accepting contributions or making expenditures for an exempt function," IRC § 527(e)(1), which is defined as the "function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to" any federal office, office in a political organization, or the election of Presidential electors. IRC § 527(e)(2). Any PAC which seeks to maintain its exemption under these provisions must therefore demonstrate that its lobbying and policy activities have an electoral purpose.[22] Thus, any organization that conducts grassroots lobbying through a PAC would risk the imposition of significant taxes which would not apply if it uses its general treasury funds to make the same expenditures.

Third, if courts are required, as Intervenors suggest, to determine whether the *MCFL* or PAC options are viable alternatives in a particular case, as-applied challenges will become

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168 F.3d 705, 714 (4th Cir. 1999); *Day v. Holahan*, 34 F.3d 1356, 1363-64 (8th Cir. 1994).

[22] *See* Treas. Reg. § 1.527-2(a)(3) ("nonpartisan educational workshops" which are not intended to influence the selection and election process are not exempt function activities); P.L.R. 9725036 (June 23, 1997) (grassroots lobbying activities are for an exempt function under IRC § 527 where they "have a political purpose.")

expansive factfinding exercises into issues well beyond the purpose or effect of the advertisements in question. Intervenors, for example, rely on the fact that WRTL "offered no specific evidence to support" its claim that "it was unable to raise sufficient funds for its PAC in 2004 to finance the $100,000 it expected to spend on the ads." Intervenors' Brief at 29. In the district court, the FEC similarly offered as proposed findings of fact its assertions that "[r]ather than being unable to raise money for its federal PAC in 2004, it appears that WRTL ceased raising money for that account and shifted its fundraising efforts toward its general treasury" and that "WRTL made no special effort in 2004 to raise additional PAC funds or recruit new members." FEC Proposed Findings, Nos. 122, 130, at J.A. 41, 43.[23] Putting aside the burden such inquiries would place on the parties and the courts, federal judges do not have the expertise to make such determinations. On the other hand, unless facts such as these are to be considered, Intervenors' argument would virtually eliminate the as-applied challenge approved in *WRTL I* as a viable remedy, for every 501(c)4 can, at least in theory, establish a PAC or switch to *MCFL* status to conducts its activities.

Finally, the Court's reliance on the PAC option in *McConnell* provides no support for a similar approach in as-applied cases. In a facial challenge such as *McConnell*, the ability of corporations to establish PACs to conduct electioneering communications had bearing on the Court's determination of BCRA § 203's overbreadth, because the availability of PACs could mean that fewer businesses and nonprofit corporations would seek to use their general treasury funds for such expenditures. But the PAC option has no logical relevance to the as-applied constitutional question of whether specific

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[23] The agency attempted to support this ultimate conclusion by comparing the funds raised by WRTL in 2004 with the funds it had raised in earlier years, *id.* No. 123, and by further comparing WRTL's fundraising in 2004 with national trends. *Id.* Nos. 125 & 126, at J.A. 42.

issue advertisements are "sham" or "genuine"; whether grass-roots lobbying communications are paid for with PAC or treasury funds, their purpose and effect remain the same.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

MICHAEL B. TRISTER *
B. HOLLY SCHADLER
LICHTMAN, TRISTER & ROSS, PLLC
1666 Connecticut Avenue, NW
Washington, D.C. 20009
(202) 328-1666

* Counsel of Record

Counsel for Amicus

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Nos. 06-969 & 06-970

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Appellant,*

v.

WISCONSIN RIGHT TO LIFE, *Appellee*

SENATOR JOHN MCCAIN, ET AL., *Appellant,*

v.

WISCONSIN RIGHT TO LIFE, *Appellee*

On Appeals from the United States District Court
for the District of Columbia

BRIEF AMICI CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND OF FOCUS ON THE FAMILY IN SUPPORT OF APPELLEE

STEPHEN W. REED
REED & BROWN, LLP
35 North Lake Avenue
Suite 960
Pasadena, California 91101
(626) 449-4521
Counsel for Focus on the Family

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
JAMES M. HENDERSON, SR.
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890
Counsel for the American Center for Law and Justice

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BE & K Construction Company v. NLRB, 536 U.S. 516 (2002) 17-18
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) ..... 11, *passim*
City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) ..... 11, *passim*
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Parker v. Brown, 317 U.S. 341 (1943) 11
Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993) 16-17
United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) ..... 11, *passim*
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Statutes, Constitutions, and Other Laws

1628 Petition of Right, 3 Chas.1 c.1 (http://www.nationalarchives.gov.uk/pathways/citizenship/rise_parliament/transcripts/petition_right.htm 6-7
1689 Bill of Rights, 1 W. & M., Sess. 2, ch. (1689) (http://www.nationalarchives.gov.uk/pathways/citizenship/rise_parliament/transcripts/bill_rights.htm) 7-8
"An Act Prohibiting Trade and Intercourse with America," 16 Geo. III., c. 5 9

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Annals of Congress, House of Representatives, 1st Congress, 1st Sess., 451 (June 8, 1789) 10
House of Commons Journal Volume 1: 27 May 1628, Journal of the House of Commons: volume 1: 1547-1629 (1802) 6
House of Commons Journal Volume 10: 16 December 1689; Journal of the House of Commons: volume 10: 1688-1693 (1802) 7
House of Lords Journal Volume 3: 27 May 1628, Journal of the House of Lords: volume 3: 1620-1628 (1802) 6
House of Lords Journal Volume 14: 16 December 1689, Journal of the House of Lords: volume 14: 1685-1691 .. 7
Nominations: Hearing Before the S. Comm. on the Judiciary, 108th Cong. (Sept. 22, 2004) 20

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Journals, Treatises and Other Authorities

Epps, "The Antebellum Political Background of the Fourteenth Amendment." 67 LAW AND CONTEMP. PROB. 175 (2004) 10

SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606-1775 (Wm. MacDonald ed. 1899) 8

G. SMITH, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND (Charles Scribner's Sons 1955) ..... 5, *passim*

CHARLES C. TANSILL, AND LIBRARY OF CONGRESS LEGISLATIVE REFERENCE SERVICE, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Washington. Govt. Print. Office, 1927) ..... 8, *passim*

Spanbauer, "The First Amendment Right to Petition Government for a Redress of Grievances: Cut From A Different Cloth," 21 HASTINGS CONST. LAW QUARTERLY 15 (Fall 1993) 4, 8-9

INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is a not-for-profit legal and educational organization dedicated to, *inter alia*, the defense of rights guaranteed under the First Amendment to the United States Constitution. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for amici. In particular, Counsel of Record for amicus was Counsel of Record and presented oral argument for appellees Emily Echols *et al.* (minors) in *FEC v. McConnell*, 540 U.S. 93, 231-32 (2003).

Focus on the Family is a California non-profit religious corporation committed to strengthening the family in the United States and abroad. One of its express purposes is to propagate and spread the Gospel of Jesus Christ. Focus on the Family's interest in this case stems from the fact that it is actively involved in the promotion of the freedom of speech and expression and actively opposes restriction on private speech. Focus on the Family distributes a daily radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada and around the world. Focus on the Family publishes and distributes Focus on the Family magazine and other literature that is received by more than 2 million households each month. Topics addressed in the daily radio broadcast and in printed literature published

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1. The parties in this case have consented to the filing of this brief. Letters of consent to the filing of this brief have been filed with the Court. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

and distributed by Focus on the Family frequently concern religious expression, freedom of speech, and the right of individuals, privately, to express their opinions, whether religious or otherwise. Focus on the Family has, over the past twenty years, frequently urged its constituents to write or call their elected representatives to make their views known on issues associated with pending legislation.

SUMMARY OF ARGUMENT

This Court should take the opportunity presented by these consolidated appeals to confirm the constitutional warrant, under the First Amendment Right to Petition for Redress of Grievances, for genuine issue advertisements by grassroots lobbying organizations.

The storied right to petition for redress of grievances is more than a historical artifact of history. That right, both in its exercise and in the charters and proclamations affirming it, is inextricably wound up in the history of this Nation and of England before it. While Magna Carta, the Petition of Right and the English Bill of Rights mark the trail leading to it, an amendment was required to make the right to petition for redress of grievances fundamental in the federal constitutional scheme.

The right to petition for redress of grievances, constitutional in scope, has been construed by this Court in a series of antitrust and related cases, to bar the application of normal principles of antitrust law, under the *Noerr-Pennington* Doctrine. In the *Noerr-Pennington* line of cases, this Court crafted a rule of exception from the operation of antitrust law.

It did so, in principal part, to avoid the constitutional difficulty that would be presented if the antitrust laws were not understood to skirt the perimeter of the right to petition for redress of grievances. In like vein, here, this Court should take the opportunity afforded by the consolidated cases to affirm the constitutional dimensions of the right of the people to petition for redress of grievances. In doing so, this Court should craft a rule respecting the exercise of that right in the formulation and broadcasting of genuine issue advertisements during the statutory blackout periods.

ARGUMENT

I. THE PROHIBITION OF GENUINE ISSUE ADVERTISEMENTS BY GRASSROOTS LOBBYING GROUPS DURING THE PERIOD PRIOR TO PRIMARIES AND GENERAL ELECTIONS DIRECTLY AFFRONTS THE RIGHT OF THE PEOPLE TO PETITION FOR A REDRESS OF GRIEVANCES.

The United States Government does not "take a holiday" beginning thirty days before primary elections and sixty days before general elections. Even though Congress recesses in advance of general elections, seemingly for the purpose of allowing members the opportunity to campaign last minute for re-election, the business of governing continues.

Because the business of governing continues, the business of the People, that is, the business of giving instructions to their elected representatives continues. And likewise, the business of seeking redress of grievances continues. When Congress enacted the Bipartisan Campaign Reform Act of 2002, it acted

in derogation of these facts and to the detriment of the right of the people to petition for a redress of grievances through the use of genuine issue advertisements by grassroots lobbying organizations. The right to petition is fundamental,[2] and warrants this Court's close guardianship.

A. The Right to Petition for A Redress of Grievances

1. The English Antecedents to the Right to Petition for a Redress of Grievances

The constitutional right to petition for a redress of grievances was not fashioned from whole cloth by the First federal Congress in 1789. An English people had framed this Nation, and those Englishmen not only knew of Magna Carta, Petition of Right, and the English Bill of Rights, they had pursued relief in accord with them before declaring independence. To fairly get the meaning of the right to petition for redress, a review of its English antecedents is required.

In June 1215, at Runnymede, England, King John met with several of his Barons. There, the terms of the King's concessions were determined; within several days, the king signed the Magna Carta, or Great Charter, under compulsion applied against him by a plurality of his Barons. G. SMITH, A

2. It has been suggested, with good ground therefor, that the right to petition for redress of grievances is superior to the other rights protected from Congressional abridgement by the First Amendment. *See generally* Julie Spanbauer, "The First Amendment Right to Petition Government for a Redress of Grievances: Cut From A Different Cloth," 21 HASTINGS CONST. LAW QUARTERLY 15 (Fall 1993).

CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 132 (Charles Scribner's Sons 1955).[3] *See generally* Magna Carta (http://www.bl.uk/treasures/ magnacarta/translation.html) (last viewed March 17, 2007). In paragraph 67 of the 1215 Magna Carta, King John expressly crafted a process for his Barons to petition for the redress of "transgressions."[4] More important, perhaps, than that specific provision of the Great Charter is the persuasive process that led King John to make the concession of Magna Carta; the process that gave rise to the King's concessions serves to this day as a powerful archetype of the petition process.

Magna Carta simply redressed wrongs. The

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3. That Magna Carta of 1215 was but one of several documents so called. G. SMITH, at 136.

4. Paragraph 61 of Magna Carta bound the King and his Officers to make redresses "without delay." In fact, the provision is quite a stark authorization of direct, self-help:

> And if we shall not have corrected the transgression (or, in the event of our being out of the realm, if our justiciar shall not have corrected it) within forty days, reckoning from the time it has been intimated to us (or to our justiciar, if we should be out of the realm), the four barons aforesaid shall refer that matter to the rest of the five and twenty barons, and those five and twenty barons shall, together with the community of the whole realm, distrain and distress us in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children; and when redress has been obtained, they shall resume their old relations towards us.

> significant thing is that the wrongs were substantially those of all bad governments in any age and the principles of redress have changed but little through the centuries. Each clause was addressed to a specific problem, written in direct and simple language, prepared by practical men who knew what they were about.

G. SMITH, at 133.

Some four centuries later, as England moved closer and closer to civil war, a train of abuses, including denial and abrogation of rights and privileges confirmed by King John in Magna Carta, gave rise to the 1628 Petition of Right, 3 Chas.1 c.1. Adopted by Parliament with the support of Sir Edward Coke among others, *see* House of Commons Journal Volume 1: 27 May 1628, Journal of the House of Commons: volume 1: 1547-1629 (1802), pp. 905-06, and unanimously even in the House of Lords, *see* House of Lords Journal Volume 3: 27 May 1628, Journal of the House of Lords: volume 3: 1620-1628 (1802), pp. 824-26, the Petition of Right pressed the case of serious grievances by Parliament against the Crown.

King Charles I took cognizance of the Petition and agreed to examine the merits of its claims. G. SMITH, at 320. Among the grievances claimed in the Petition, several stand out: forced loans to the Crown; arbitrary arrest; imprisonment against the terms provided in the Magna Carta; interference with property; abuses of the Great Writ; quartering of troops without compensation; imposition of martial law. G. SMITH, at 319-20; http://www.nationalarchives.gov.uk/pathways/citizenship/rise_parliament/transcripts/petition_right.htm (text transcript by

the Parliamentary Archives) (last viewed March 17, 2007). In laying out the claimed wrongs, Parliament again followed the model of petitioning the Crown for relief from the wrongs stated in the Petition.

In the aftermath of the English Civil Wars and the subsequent ascendancy of William and Mary, Parliament enacted – with the Crown's approval – legislation settling the question of succession to the throne and, at the same time, confirming expressly the rights of the subjects of the Crown. G. SMITH, at 367-68. Those objects were obtained in the 1689 Bill of Rights. 1 W. & M., Sess. 2, ch. 2 (1689) (http://www.nationalarchives.gov.uk/pathways/citizenship/rise_parliament/transcripts/bill_rights.htm) (text transcript by the Parliamentary Archives) (last viewed March 17, 2007); House of Lords Journal Volume 14: 16 December 1689, Journal of the House of Lords: volume 14: 1685-1691, pp. 372-73; House of Commons Journal Volume 10: 16 December 1689, Journal of the House of Commons: volume 10: 1688-1693 (1802), pp. 309-10.

As with the Petition of Right, the English Bill of Rights contained indictments of prior abuses by the Crown or the officers of the Crown. Further, the Bill of Rights directly settled the question of the rights of the Crown's subjects. Key rights concluded by Parliament, in the Bill of Rights, to belong to the Crown's subjects included: freedom from royal interference with the law; freedom from taxation by royal prerogative, that is, without agreement by Parliament; freedom to petition the King; freedom of Protestant subjects to have arms for defence, as allowed by law; freedom to elect members of Parliament without interference from the Sovereign;

freedom from cruel and unusual punishments, and excessive bail; and, freedom from fines and forfeitures without trial. 1 W. & M., Sess. 2, ch. 2 (1689).

2. The American Experience

Just as quickly as English peoples began to settle on the shores of the American continent, they began to establish among themselves basic principles of governance. Among those early charters, the Massachusetts Body of Liberties of 1641 was first to protect expressly the right to petition:

> Every man whether Inhabitant or ffoffeiner, free or not free shall have libertie to come to any publique Court, Councell, or Towne meeting, and either by speech or writeing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner.

SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606-1775, at 73, 75 (Wm. MacDonald ed. 1899) (hereafter cited as "MacDonald's SELECT CHARTERS").

Subsequent charters and constitutions affirmed that the right to petition for redress of grievances was an accepted heritage of the English colonists in America. *See* Julie Spanbauer, "The First Amendment Right to Petition Government for a Redress of Grievances: Cut From A Different Cloth," 21 HASTINGS

CONST. LAW QUART., nn. 83-87 (Fall 1993) (collecting other charter provisions regarding the right to petition). By the time of the meeting of the First Continental Congress, the sentiment that the right to petition was a fundamental right of the American colonists was established. In the Declaration and Resolves, the First Continental Congress expressly declared as much:

> That they have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.

Declaration and Resolves, First Continental Congress, 14 October 1774, (*in* CHARLES C. TANSILL, AND LIBRARY OF CONGRESS LEGISLATIVE REFERENCE SERVICE, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1, 3 (Washington: Govt. Print. Office, 1927)).

Indeed, the Second Continental Congress approved a Petition to King George, for redress of the many grievances that were propelling the colonies toward revolution. *See* Petition to the King, 8 July 1775 (*in* MacDonald's SELECT CHARTERS, at 381-85). That plea for redress King George and Parliament alike rejected; in response, Parliament enacted, with royal approbation, "An Act Prohibiting Trade and Intercourse with America." 16 Geo. III., c. 5 (*in* MacDonald's SELECT CHARTERS, at 391-96). And it was precisely because repeated petitioning to Parliament and the King had not salutary effect that the American gambit for independence became unavoidable. As Thomas Jefferson phrased the problem, "In

every stage of these oppressions we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by repeated injury." DECL. OF INDEP. para. 29.

Given the English precedents of Magna Carta, the Petition of Right and the Bill of Rights, taken together with the numerous colonial charter assertions of the right to petition for a redress of grievances and the extent of colonial efforts to obtain redress before committing revolution, it is unsurprising, when James Madison proposed a Bill of Rights in the First Congress, that he included the right to petition therein. *See* Annals of Congress, House of Representatives, 1st Congress, 1st Sess., 451 (June 8, 1789) (proposing, "The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances").

Although the right to petition for redress of grievances was, by this long train of events, enshrined as a fundamental right in the First Amendment to the Constitution, it would be misleading to say that it has enjoyed a tenure there unsullied by instances of disregard. In addition to the threatened application of antitrust law to petition activities, *see* Argument II, *infra*, the most storied instance of that disregard was the period of the so-called "Gag Rule," when the House of Representatives adopted a rule prohibiting citizens from lodging petitions for redress, as a way to deal with a flood of abolition petitions being presented to Congress. *See* Garrett Epps, "The Antebellum Political Background of the Fourteenth Amendment." 67 LAW AND CONTEMP. PROB. 175, 192 nn. 116-17 and accompanying text (2004).

B. To Survive Constitutional Scrutiny, the Prohibition on Issue Advertisements By Grassroots Lobbying Organizations Must Be Limited By An Appropriately Crafted Rule Leaving Unabridged Those Genuine Issue Advertisements that Are Protected by the Right of the People to Petition for Redress of Grievances.

1. The *Noerr-Pennington* Doctrine: Drawing Limits to Antitrust Law From the First Amendment

The question whether genuine issue advertisements should be or are subject to prohibition under the Constitution can be answered by drawing an analogy to this Court's development of the *Noerr-Pennington* Doctrine. That doctrine is a corollary of its holding in *Parker v. Brown*, 317 U.S. 341 (1943) that "the Sherman Act did not apply to anticompetitive restraints imposed by the States 'as an act of government.'" *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372, 379 (1991) (quoting *Parker v. Brown*, 317 U.S. 341, 352 (1943)). The doctrine evolved in three cases decided by this Court: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). As explained by this Court, "'Where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (citation omitted).

In *California Motor Transport*, this Court identified two grounds on which *Noerr* rested:

> (1) . . . To hold that the government retains the power to act in [a] representative capacity and yet hold . . . that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.
>
> (2)The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot . . . lightly impute to Congress an intent to invade these freedoms.

California Motor Transport Co., 404 U.S. at 510 (citations omitted).[5]

Important to the *Noerr-Pennington* Doctrine is what has become known as its "sham exception," described briefly by this Court in *Noerr*:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is

5. In *California Motor Transport*, this Court then applied the *Noerr-Pennington* Doctrine to courts, explaining that "[t]he same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government." *Id.*

> actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

Noerr, 365 U.S. at 144. In *California Motor Transport*, this Court considered this "sham exception" as it applied to a situation where one group of highway carriers asserted that another group had "instituted state and federal proceedings to resist and defeat applications by [the highway carriers] to acquire operating rights or to transfer or register those rights." *California Motor Transport Co.*, 404 U.S. at 509. This Court reasoned that the activities alleged would fall under the sham exception if facts of that sort were proven true. *Id.* at 515-16. In *Omni Outdoor Advertising*, the Court described the sham exception as "encompass[ing] situations in which persons use the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon" and, in the case of litigation, as involving "a defendant whose activities are 'not genuinely aimed at procuring favorable government action' at all." *Omni Outdoor Advertising*, 499 U.S. at 380 (citations omitted).

This Court rejected application of the sham exception in *Omni Outdoor Advertising*. In doing so, this Court explained that, although Columbia Outdoor Advertising "indisputably set out to disrupt Omni's business relationships, it sought to do so not through the very process of lobbying, or of causing the city council to consider zoning measures, but rather through the ultimate *product* of that lobbying and consideration, viz., the zoning ordinances" and that "the purpose of delaying a competitor's entry into the market does not render lobbying

activity a "sham," unless . . . the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks." *Id.* at 381.

2. The *Noerr-Pennington* Doctrine reflects the constitutional right of the people to petition under the First Amendment.

In *Omni Outdoor Advertising*, this Court discussed the connection between the *Noerr-Pennington* Doctrine and the right to petition:

> While *Parker* recognized the States' freedom to engage in anticompetitive regulation, it did not purport to immunize from antitrust liability the private parties who urge them to engage in anticompetitive regulation. However, it is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right "to petition the Government for a redress of grievances," U.S. Const., Amdt. 1, to establish a category of lawful state action that citizens are not permitted to urge. Thus, beginning with [*Noerr*], we have developed a corollary to *Parker*: The federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government. This doctrine, like *Parker*, rests ultimately upon a recognition that the antitrust laws, "tailored as they are for the business world, are not at all appropriate for application in the political arena." That a private party's political motives are selfish is irrelevant: "Noerr shields from the Sherman Act a concerted

> effort to influence public officials regardless of intent or purpose."

Id. at 379-80 (citations omitted). In *Noerr*, this Court declined to apply the Sherman Act to the efforts of railways to influence the state legislature and governor in, among other things, passing legislation that would injure the trucking industry; this Court said it was basing the decision on the "essential dissimilarity" between the actions at issue and the traditional actions covered by the Act and on "other difficulties." *Noerr*, 365 U.S. at 136-37. The "other difficulties" referred to by the Court included that "[t]o hold that the government retains the power to act in [a] representative capacity and yet hold . . . that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Id.* at 137.

> [S]uch a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 137-38. Further addressing the right of petition, this Court said, "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so" *id.* at 139, and that

> [a] construction of the Sherman Act that would

> disqualify people from taking a public position on matters in which they are financially interested would . . . deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. . . . We . . . hold that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had.

Id. at 139-40.

While this Court, in *Pennington*, did not explicitly discuss the right to petition, in *California Motor Transport* this Court said that it had "followed that view" in *Pennington*, referring by "that view" to the two grounds of the *Noerr* decision as identified by the Court in *California Motor Transport*. *California Motor Transport*, 404 U.S. at 510. Also, the *Pennington* Court held expressly, "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Pennington*, 381 U.S. at 670. In *California Motor Transport*, this Court clarified that the "right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." 404 U.S. at 510.

Summarizing key principles from *Noerr* and *Pennington* regarding the right to petition, this Court, in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), said:

> Those who petition government for redress are generally immune from antitrust liability. . . . In light of the government's "power to act in [its] representative capacity" and "to take actions . . . that operate to restrain trade," we reasoned that the Sherman Act does not punish "political activity" through which "the people . . . freely inform the government of their wishes." Nor did we "impute to Congress an intent to invade" the First Amendment right to petition."[6]

Id. at 56.

Of course, the *Noerr-Pennington* Doctrine is a constitutional creation responsive to otherwise permissible applications of antitrust law. Nonetheless, the doctrine's justification and this Court's reasoning in elucidating the doctrine, are suggestive of the broader application of constitutional principles. After all, its implications barred this Court from "lightly imput[ing] to Congress an intent to invade" the freedoms protected by the Bill of Rights.

In *BE & K Construction Company v. NLRB*, 536 U.S. 516 (2002), this Court discussed interpreting federal law in light of the right to petition, providing a more complete picture of the issue and the role played by the *Noerr-Pennington* Doctrine:

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6. This case dealt with the development of a test regarding the sham exception in as it relates to litigation (that the lawsuit must be objectively baseless and must conceal an attempt to interfere *directly* with the business relationships of a competitor). *Professional Real Estate Investors*, 508 U.S. at 60-61.

> The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." We have recognized this right to petition as one of "the most precious of the liberties safeguarded by the Bill of Rights," and have explained that the right is implied by "the very idea of a government, republican in form."
>
> We have also considered the right to petition when interpreting federal law. In the antitrust context, for example, we held that "the Sherman Act does not prohibit . . . persons from associating . . . in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." We based our interpretation in part on the principle that we would not "lightly impute to Congress an intent to invade . . . freedoms" protected by the Bill of Rights, such as the right to petition.[7]

Id. at 524-25 (citations omitted). Through the *Noerr-Pennington* Doctrine, then, this Court has sought to avoid the constitutional difficulties that would result if Acts of Congress were understood to abridge the right to petition.

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7. This case dealt with applying the test from *Professional Real Estate Investors* to litigation brought under the National Labor Relations Act. *BE & K Construction Co.*, 536 U.S. at 526.

II. SIGNIFICANT ACTS OF LEGISLATIVE OR EXECUTIVE POWER DURING THE BLACKOUT PERIOD ARE SHIELDED FROM CRITICAL ANALYSIS AND FROM CALLS FOR REDRESS

This Court has expressed, in cogent terms, the inextricable connection between the right to petition for redress of grievances and maintenance of a republican form of government:

> The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.

United States v. Cruikshank, 92 U.S. 542, 552-553 (1875).

Will Rogers famously quipped, "The nation is safe . . . Congress is in recess." That view screens reality, which is that the business of government on the federal level in the United States is continuous and on-going. Thus, even with respect to such artificially crafted time frames as the thirty- and sixty-day blackouts imposed by BCRA, the conduct of the Government does not cease.

Even more to the point, the very individuals who enjoy

shielding from being named in genuine issue advertisements continue to govern, either through legislation or administration, and by the exercise of the prerogatives of office can actively affect the national conversation about issues of great public importance. That fact is evidenced by examining artifacts of that governance from covered time periods. The wrong of such an approach is evident from the example presented in the present case.

Here, Wisconsin Right to Life, Inc., sought to use genuine issue advertisements to address the failure of the United States Senate to move forward on judicial nominations. WRTL planned the radio and television broadcasts to take place during the sixty day blackout period before the 2004 general election. The FEC presses the point that no judicial filibuster votes (cloture petitions) were conducted during the blackout period or for the balance of 2004. Brief of the FEC at 11. That interesting "fact" studiously ignores the key governance question: do the legislative and executive branches abandon the nomination and confirmation processes during the covered time period?

The simple answer, and the obvious one, is that neither the legislative nor the executive abandoned the ongoing process of evaluating and/or making nominations and confirmations. The President continued to make nominations, *see, e.g.*, 40 Weekly Comp. Pres. Doc. 2034-35 (Sept. 15, 2004) (nomination of J. Michael Seabright), and the Senate continued to conduct hearings, *see, e.g., Nominations: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (Sept. 22, 2004). In the appendices to this brief, the ACLJ has collected the actions of the President and of the United States Congress. *See generally*

Appendices A-E. An examination of these artifacts of government action confirms the fact that significant governmental activity takes place during blackout periods and leaves one with the definite suspicion that the silencing of the people's right to petition was more than an accident.

In 2004, the general election took place on Tuesday, November 2, 2004. Sixty days prior to Election Day was Friday, September 3, 2004. For purposes of the prohibition on issue advertisments by grassroots lobbying organizations, thus, the relevant sixty day period blacking out coverage was from September 3, 2004, through November 2, 2004.

During that covered period, the President conducted the following business:

(1) issued four executive orders;
(2) issued twenty-nine proclamations;
(3) signed fifty-five legislative acts or bills into law;
(4) announced thirty-three intentions to nominate;
(5) announced eight intentions to designate;
(6) announced forty-three intentions to appoint;
(7) submitted sixty-six nominations to the Senate;
(8) withdrew three nominations from the Senate;
(9) declared twenty-six federal emergencies or major disasters;
(10) sent twelve presidential communications to Congress;
(11) sent twenty-one presidential communications to federal agencies;
(12) issued three executive notices;
(13) issued twelve statements;
(14) made remarks after eight meetings with foreign

leaders;

(15) made seventy remarks regarding the 2004 federal election;

(16) made twenty-two general remarks;

(17) made seven radio addresses; and

(18) had two other media interactions. These executive actions are gathered in Appendix A to this brief.

In 2006, the general election took place on Tuesday, November 7th. Sixty days prior to Election Day was Friday, September 8th. For purposes of the prohibition on issue advertisements by grassroots lobbying organizations, thus, the relevant sixty day period blacking out coverage was from September 8, 2006, through November 7, 2006.

During that covered period, the President conducted the following business:

(1) issued three executive orders;

(2) issued thirty-five proclamations;

(3) signed ninety-one legislative acts or bills into law;

(4) announced twenty-nine intentions to nominate;

(5) announced one intention to designate;

(6) submitted thirty-one nominations to the Senate;

(7) withdrew three nominations;

(8) made two recess appointments;

(9) announced twenty-five intentions to appoint people to non-principal offices;

(10) issued one statement on the retirement of a federal employee;

(11) declared ten federal emergencies or major disasters;

(12) sent seventeen presidential communications to

congress;

(13) sent twelve presidential communications to federal agencies;

(14) made thirty-one statements;

(15) made remarks made after nineteen meetings with foreign leaders;

(16) made thirty six remarks regarding the 2006 federal election;

(17) made forty-one general remarks;

(18) made nine radio addresses;

(18) had three other media interactions; and

(19) had four miscellaneous occasions at which the President spoke. These executive actions are gathered in Appendix A to this brief, at Appdx. A1, *et seq*.

Just as the President continued day by day with the government of the Nation, in both 2004 and 2006, Congress continued in session into the sixty day blackout period, holding floor votes, *see* Appendix B, hearings, *see* Appendix C, issuing reports, *see* Appendix D, and addressing a broad variety of issues, both those that seem petty and those that were essential to the national interest, *see* Appendix E.

An examination of the actions of the President and of the Congress during these two sixty day blackout periods reveals both a broad scope of actions and an equally broad sweep of subjects of governance. Petty matters and vital, each found themselves placed on the Nation's center stage by executive or legislative *ipse dixit*. But, because of the black-out period, the floor votes, the nomination hearings and reports, the joint press conferences with foreign leaders, and the remarks from the well of the House or Senate, are conducted in a silence that is

all the more profound because the voice silenced is the petitioning voice of the People.

CONCLUSION

The business of government certainly does not cease for thirty and sixty day periods in advance of federal elections. Nor will the People consent to being silenced by the legislative *ipse dixit* that the business of being governed must be conducted under cover of silence. Just as this Court concluded, in the context of antitrust laws, that the First Amendment required that berth be given to combinations for the purpose of obtaining a redress of grievances, this Court should undertake in the present cases to apply a rule that excludes from the reach of the issue advertisement ban those advertisements that are not shams upon the public.

Respectfully submitted,

STEPHEN W. REED
REED & BROWN, LLP
35 North Lake Avenue
Suite 960
Pasadena, California 91101
(626) 449-4521
Counsel for Focus on the Family

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
JAMES M. HENDERSON, SR.
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890
Counsel for the American Center for Law and Justice

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APPENDIX

Appendix A

ACTIONS OF THE PRESIDENT OF THE UNITED STATES DURING THE SIXTY DAYS PRIOR TO THE GENERAL ELECTION 2004 AND 2006*

2004 EXECUTIVE ACTIONS

Executive Orders (4)

1. Termination of Emergency Declared in Executive Order 12543 With Respect to the Policies and Actions of the Government of Libya and Revocation of Related Executive Orders, 40 Weekly Comp. Pres. Doc. 2067 (Sept. 20, 2004).

2. Assignment of Functions Relating to Certain Appointments, Promotions, and Commissions in the Armed Forces, 40 Weekly Comp. Pres. Doc. 2172 (Sept. 30, 2004).

3. Amendment to Executive Order 13173, Interagency Task Force on the Economic Development of the Central San Joaquin Valley, 40 Weekly Comp. Pres. Doc. 2505 (Oct. 20, 2004).

4. Providing Opportunities for Service-Disabled Veteran Businesses To Increase Their Federal Contracting and Subcontracting, 40 Weekly Comp. Pres. Doc. 2505 (Oct. 20, 2004).

Proclamations (29)

1. Minority Enterprise Development Week, 40 Weekly Comp. Pres. Doc. 1850 (Sept. 4, 2004).

2. Proclamation to Modify the Generalized System of Preferences, and for other purposes, 40 Weekly Comp. Pres. Doc. 1892 (Sept. 7, 2004).

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*. In 2004, the general election took place on Tuesday, November 2nd. Sixty days prior to Election Day was Friday, September 3rd. In 2006, the general election took place on Tuesday, November 7th. Sixty days prior to Election Day was Friday, September 8th.

3. National Alcohol and Drug Addiction Recovery Month, 40 Weekly Comp. Pres. Doc. 1949 (Sept. 10, 2004).

4. National Ovarian Cancer Awareness Month, 40 Weekly Comp. Pres. Doc. 1950 (Sept. 10, 2004).

5. National Days of Prayer and Remembrance, 40 Weekly Comp. Pres. Doc. 1951 (Sept. 10, 2004).

6. Patriot Day, 40 Weekly Comp. Pres. Doc. 1952 (Sept. 10, 2004).

7. National Prostate Cancer Awareness Month, 40 Weekly Comp. Pres. Doc. 1992 (Sept. 14, 2004).

8. National Historically Black Colleges and Universities Week, 4 Weekly Comp. Pres. Doc. 1993 (Sept. 14, 2004).

9. National POW / MIA Recognition Day, 40 Weekly Comp. Pres. Doc. 1993 (Sept. 14, 2004).

10. Citizenship Day and Constitution Week, 40 Weekly Comp. Pres. Doc. 2032 (Sept. 17, 2004).

11. National Hispanic Heritage Month, 40 Weekly Comp. Pres. Doc. 2047 (Sept. 17, 2004).

12. National Farm Safety and Health Week, 40 Weekly Comp. Pres. Doc. 2066 (Sept. 20, 2004).

13. National Employer Support of the Guard and Reserve Week, 40 Weekly Comp. Pres. Doc. 2082 (Sept. 21, 2004).

14. Family Day, 40 Weekly Comp. Pres. Doc. 2137 (Sept. 24, 2004).

15. National Hunting and Fishing Day, 40 Weekly Comp. Pres. Doc. 2150 (Sept. 24, 2004).

16. National Breast Cancer Awareness Month, 40 Weekly Comp. Pres. Doc. 2216 (Oct. 1, 2004).

17. Child Health Day 2259, 40 Weekly Comp. Pres. Doc. 2259 (Oct. 4, 2004).

18. National Fire Week, 40 Weekly Comp. Pres. Doc. 2259 (Oct. 4, 2004).

19. German-American Day, 40 Weekly Comp. Pres. Doc. 2275 (Oct. 6, 2004).

20. Leif Erikson Day, 40 Weekly Comp. Pres. Doc. 2223 (Oct. 7, 2004).

21. General Pulaski Memorial Day, 40 Weekly Comp. Pres. Doc. 2351 (Oct. 11, 2004).

22. National School Lunch Day, 40 Weekly Comp. Pres. Doc. 2363 (Oct. 12, 2004).

23. Columbus Day, 40 Weekly Comp. Pres. Doc. 2351 (Oct. 13, 2004).

24. National Mammography Day, 40 Weekly Comp. Pres. Doc. 2422 (Oct. 15, 2004).

25. White Cane Safety Day, 40 Weekly Comp. Pres. Doc. 2523 (Oct. 15, 2004).

26. National Character Counts Week, 40 Weekly Comp. Pres. Doc. 2455 (Oct. 18, 2004).

27. National Disability Employment Awareness Month, 40 Weekly Comp. Pres. Doc. 2503 (Oct. 18, 2004).

28. National Forest Products Week, 40 Weekly Comp. Pres. Doc. 2504 (Oct. 20, 2004).

29. Gold Star Mother's Day, 40 Weekly Comp. Pres. Doc. 2152 (Oct. 25, 2004).

Signed Legislation (55)

1. Emergency Supplemental Appropriations for Disaster Relief Act, 2004, 40 Weekly Comp. Pres. Doc. 1924 (Sept. 8, 2004).

2. Sports Agent Responsibility and Trust Act, 40 Weekly Comp. Pres. Doc. 2142 (Sept. 24, 2004).

3. To provide for the conveyance of the real property located at 1081 West Main Street in Ravenna, Ohio, 40 Weekly Comp. Pres. Doc. 2142 (Sept. 24, 2004).

4. To provide an additional temporary extension of programs under the Small Business Act and the Small Business

Investment Act of 1958 through September 30, 2004, and for other purposes, 40 Weekly Comp. Pres. Doc. 2142 (Sept. 24, 2004).

5. Harpers Ferry National Historical Park Boundary Revision Act of 2004, 40 Weekly Comp. Pres. Doc. 2142 (Sept. 24, 2004).

6. Welform Reform Extension Act, Part VIII, 40 Weekly Comp. Pres. Doc. 2207 (Sept. 30, 2004).

7. Making continuing appropriations for the fiscal year 2005, and for other purposes, 40 Weekly Comp. Pres. Doc. 2207 (Sept. 30, 2004).

8. Surface Transportation Extension Act of 2004, Part V, 40 Weekly Comp. Pres. Doc. 2207 (Sept. 30, 2004).

9. Working Families Tax Relief Act of 2004, 40 Weekly Comp. Pres. Doc. 2287 (Oct. 4, 2004).

10. Mount Rainier National Park Boundary Adjustment Act of 2004, 40 Weekly Comp. Pres. Doc. 2287 (Oct. 5, 2004).

11. Johnstown Flood National Memorial Boundary Adjustment Act of 2004, 40 Weekly Comp. Pres. Doc. 2287 (Oct. 5, 2004).

12. Martin Luther King, Junior, National Historic Site Land Exchange Act, 40 Weekly Comp. Pres. Doc. 2287 (Oct. 5, 2004).

13. Carpinteria and Montecito Water Distribution Systems Conveyance Act of 2004, 40 Weekly Comp. Pres. Doc. 2287 (Oct. 5, 2004).

14. To amend the Reclamation Wastewater and Groundwater Study and Facilities Act to authorize the Secretary of the Interior to participate in the Williamson County, Texas, Water Recycling and Reuse Project, and for other purposes, 40 Weekly Comp. Pres. Doc. 2287 (Oct. 5, 2004).

15. Southwest Forest Health and Wildfire Prevention Act of 2004, 40 Weekly Comp. Pres. Doc. 2287 (Oct. 5, 2004).

16. To amend the Reclamation Project Authorization Act of 1972 to clarify the acreage for which the North Loup division is authorized to provide irrigation water under the Missouri River Basin project, 40 Weekly Comp. Pres. Doc. 2288 (Oct. 5, 2004).

17. To extend the term of the Forest Counties Payments Committee, 40 Weekly Comp. Pres. Doc. 2288 (Oct. 5, 2004).

18. To amend the Stevenson-Wydler Technology Innovation Act of 1980 to permit Malcolm Baldrige National Quality Awards to be made to nonprofit organizations, 40 Weekly Comp. Pres. Doc. 2288 (Oct. 5, 2004).

19. Timucuan Ecological and Historic Preserve Boundary Revision Act of 2004, 40 Weekly Comp. Pres. Doc. 2288 (Oct. 5, 2004).

20. Commemorating the opening of the National Museum of the American Indian, 40 Weekly Comp. Pres. Doc. 2288 (Oct. 5, 2004).

21. Railroad Right-of-Way Conveyance Validation Act of 2004, 40 Weekly Comp. Pres. Doc. 2288 (Oct. 5, 2004).

22. To reauthorize the Tropical Forest Conservation Act of 1998 through fiscal year 2007, and for other purposes, 40 Weekly Comp. Pres. Doc. 2288 (Oct. 6, 2004).

23. Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 40 Weekly Comp. Pres. Doc. 2413 (Oct. 13, 2004).

24. Craig Recreation Land Purchase Act, 40 Weekly Comp. Pres. Doc. 2413 (Oct. 13, 2004).

25. To clarify the tax treatment of bonds and other obligations issued by the Government of American Samoa, 40 Weekly Comp. Pres. Doc. 2530 (Oct. 16, 2004).

26. National Wildlife Refuge Volunteer Act of 2004, 40 Weekly Comp. Pres. Doc. 2530 (Oct. 16, 2004).

27. To amend the Safe Drinking Water Act to reauthorize the New York City Watershed Protection Program, 40 Weekly Comp. Pres. Doc. 2530 (Oct. 16, 2004).

28. To amend the Act of November 2, 1966 (80 Stat. 1112), to allow binding arbitration clauses to be included in all contracts affecting the land within the Salt River Pima-Maricopa Indian Reservation, 40 Weekly Comp. Pres. Doc. 2530 (Oct. 16, 2004).

29. Department of Homeland Security Financial Accountability Act, 40 Weekly Comp. Pres. Doc. 2530 (Oct. 16, 2004).

30. To authorize the Board of Regents of the Smithsonian Institution to carry out construction and related activities in support of the collaborative Very Energetic Radiation Imaging Telescope Array System (VERITAS) project on Kitt Peak near Tucson, Arizona, 40 Weekly Comp. Pres. Doc. 2530 (Oct. 16, 2004).

31. Global Anti-Semitism Review Act of 2004, 40 Weekly Comp. Pres. Doc. 2530 (Oct. 16, 2004).

32. North Korean Human Rights Act of 2004, 40 Weekly Comp. Pres. Doc. 2530 (Oct. 18, 2004).

33. Department of Homeland Security Appropriations Act, 2005, 40 Weekly Comp. Pres. Doc. 2530 (Oct. 18, 2004).

34. District of Columbia Appropriations Act, 2005, 40 Weekly Comp. Pres. Doc. 2530 (Oct. 18, 2004).

35. Southern Ute and Colorado Intergovernmental Agreement Implementation Act of 2004, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 18, 2004).

36. Alaska Native Allotment Subdivision Act, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 18, 2004).

37. To direct the Secretary of Agriculture to convey to the New Hope Cemetery Association certain land in the State of Arkansas for use as a cemetery, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 18, 2004).

38. To replace certain Coastal Barrier Resources System maps, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 18, 2004).

39. Manhattan Project National Historical Park Study Act, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 18, 2004).

40. To transfer Federal lands between the Secretary of Agriculture and the Secretary of the Interior, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 18, 2004).

41. El Camino Real de los Tejas National Historic Trail Act, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 18, 2004).

42. Tapoco Project Licensing Act of 2004, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 18, 2004).

43. To revise and extend the Boys and Girls Clubs of America, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 18, 2004).

44. To redesignate the Ridges Basin Reservoir, Colorado, as Lake Nighthorse, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 18, 2004).

45. Arapaho and Roosevelt National Forests Land Exchange Act of 2004, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 18, 2004).

46. The Belarus Democracy Act, 40 Weekly Comp. Pres. Doc. 2502 (Oct. 20, 2004).

47. To authorize the Gateway Arch in St. Louis, Missouri, to be illuminated by pink lights in honor of breast cancer awareness month, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 20, 2004).

48. To amend the Congressional Accountability Act of 1995 to permit members of the Board of Directors of the Office of Compliance to serve for 2 terms, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 21, 1004).

49. To authorize the Secretary of Agriculture to sell or exchange all or part of certain administrative sites and other land in the Ozark-St. Francis and Ouachita National Forests and to use funds derived from the sale or exchange to acquire, construct, or improve administrative sites, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 21, 1004).

50. To amend the Lease Lot Conveyance Act of 2002 to provide that the amounts received by the United States under that Act shall be deposited in the reclamation fund, and for other purposes, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 21, 1004).

51. National Park System Laws Technical Amendments Act of 2004, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 21, 1004).

52. To designate the facility of the United States Postal Service located at 4141 Postmark Drive, Anchorage, Alaska, as the "Robert J. Opinsky Post Office Building," 40 Weekly Comp. Pres. Doc. 2531 (Oct. 21, 1004).

53. Chimayo Water Supply System and Espanola Filtration Facility Act of 2004, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 21, 1004).

54. Garrett Lee Smith Memorial Act, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 21, 1004).

55. To extend certain authority of the Supreme Court Police, modify the venue of prosecutions relating to the Supreme Court building and grounds, and authorize the acceptance of gifts to the United States Supreme Court, 40 Weekly Comp. Pres. Doc. 2531 (Oct. 21, 1004).

Announced Intent to Nominate (33), Designate (8) or to Appoint (43)

Personnel Announcement on September 7, 40 Weekly Comp. Pres. Doc. 1920 (Sept. 7, 2004)

1. The President announced his intention to designate Tim S. McClain as Acting Assistant Secretary of Veterans Affairs (Human Resources and Administration).

2. The President announced his intention to designate Cortright Wetherill, Jr., as a Chairman of the Advisory Committee on the Arts, John F. Kennedy Center for the Performing Arts.

3. The President announced his intention to appoint W. Roy Grizzard as a member of the Committee for Purchase From People Who Are Blind or Severely Disabled.

4. The President announced his intention to appoint Michele Longo Eder and Thomas C. Royer as members of the Arctic Research Commission.

5. The President announced his intention to appoint the following individuals as members of the President's National Security Telecommunications Advisory Committee: Lawrence T. Babbio, Jr.; Gregory Q. Brown; Ken Dahlberg; William J. Hannigan; Stan Sigman; and Joseph R. Wright.

6. The President announced his intention to appoint the following individuals as members of the Board of Trustees of the John F. Kennedy Center for the Performing Arts: Elisabeth D. DeVos, Mary Mochary, Mary M. Ourisman, Gabrielle B. Reynolds, David Rubenstein, Stephen Schwarzman, Alex Spanos, and Sandy Treadwell.

7. The President announced his intention to appoint Cheryl Bates-Harris and Dorothy L. Watson as members of the Ticket to Work and Work Incentives Advisory Panel.

8. The President announced his intention to designate Berthy De La Rosa-Aponte, as Chairperson of the Ticket to Work and Work Incentives Advisory Panel.

Personnel Announcement on September 8, 40 Weekly Comp. Pres. Doc. 1920-21 (Sept. 8, 2004).1. The President announced

his intention to nominate Catherine Todd Bailey to be Ambassador to Latvia.

2. The President announced his intention to nominate Thomas V. Skinner to be an Assistant Administrator of the Environmental Protection Agency (Enforcement and Compliance Assurance).

3. The President announced his intention to nominate Douglas Menarchik to be an Assistant Administrator of the U.S. Agency for International Development (Policy and Program Coordination).

4. The President announced his intention to nominate Howard J. Krongard to be Inspector General of the Department of State.

5. The President announced his intention to designate Daniel R. Levinson as Acting Inspector General at the Department of Health and Human Services.

Personnel Announcement on September 10, 40 Weekly Comp. Pres. Doc. 1921 (Sept. 10, 2004).

1. The President announced his intention to nominate Richard Greco, Jr., to be an Assistant Secretary of the Navy (Financial Management) at the Department of Defense.

2. The President announced his intention to nominate Patrick J. Leahy and John E. Sununu to be U.S. Representatives to the General Assembly of the United Nations.

3. The President announced his intention to appoint Lisa Kirk Colburn as a member of the Advisory Committee on the Arts, John F. Kennedy Center for the Performing Arts.

4. The President announced his intention to appoint the following individuals as members of the Public Interest Declassification Board: L. Britt Snider (Chairman), Martin Faga, Steven Garfinkel, Elizabeth Rindskopf Parker, and Richard N. Smith.

Personnel Announcement on September 14, 40 Weekly Comp. Pres. Doc. 2033 (Sept. 14, 2004).

1. The President announced his intention to nominate Michael J. Harrison to be Assistant Secretary of Agriculture for Administration.

2. The President announced his intention to nominate Pamela Hughes Patenaude to be Assistant Secretary of Housing and Urban Development for Community Planning and Development.

Personnel Announcement on September 15, 40 Weekly Comp. Pres. Doc. 2033 (Sept. 15, 2004).

1. The President announced his intention to nominate Francis J. Harvey to be Secretary of the Army.

2. The President announced his intention to nominate Arden Bement, Jr., to be Director of the National Science Foundation.

Personnel Announcement on September 17, 40 Weekly Comp. Pres. Doc. 2034 (Sept. 17, 2004).

1. The President announced his intention to nominate Jesus H. Delgado-Jenkins to be an Assistant Secretary of the Treasury (Management) and, upon appointment, to designate him as Chief Financial Officer.

Personnel Announcement on September 20, 40 Weekly Comp. Pres. Doc. 2140 (Sept. 20, 2004).

1. The President announced his intention to nominate Susan L. Moore to be U.S. Alternate Representative to the 59th Session of the General Assembly of the United Nations.

2. The President announced his intention to appoint Charles J. Chaput and Michael Lewis Cromartie as members of the U.S. Commission on International Religious Freedom.

Personnel Announcement on September 23, 40 Weekly Pres. Doc. 2140 (Sept. 23, 2004).

1. The President announced his intention to nominate Ryan C. Crocker to be Ambassador to Pakistan.

2. The President announced his intention to nominate Marcie B. Ries to be Ambassador to Albania.

3. The President announced his intention to nominate Buddie J. Penn to be an Assistant Secretary of the Navy (Installations and Environment).

4. The President announced his intention to nominate the following individuals to be members of the National Science Board: Dan Arvizu, Steven C. Beering, Gerald Wayne Clough, Kelvin Kay Droegemeier, Louis J. Lanzerotti, Alan I. Leshner, Jon C. Strauss, and Kathryn D. Sullivan.

5. The President announced his intention to designate Edwin Pinero as the Federal Environmental Executive at the Environmental Protection Agency.

Personnel Announcement on October 1, 40 Weekly Comp. Pres. Doc. 2206 (Oct. 1, 2004).

1. The President announced his intention to nominate Ronald Rosenfeld to be a Director on the Board of Directors of the Federal Housing Finance Board.

2. The President announced his intention to nominate Michael Butler to be a member of the Board of Trustees of the Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation.

3. The President announced his intention to appoint Robin Cook, Charles L. Glazer, and Peter S. Watson to be members of the Board of Trustees of the Woodrow Wilson International Center for Scholars.

4. The President announced his intention to appoint David Wayne Anderson, Cynthia R. Church, and Soyna E. Medina as members of the Board of Trustees of the American Folklife Center.

5. The President announced his intention to appoint the following individuals as members of the Commission on the Abraham Lincoln Study Abroad Fellowship Program: John K. Andrews, Jr.; Jim Edgar; Lynette Boggs McDonald; and Lyn Bracewell Phillips.

6. The President announced his intention to appoint Scott Wallace (Chairman), C. Martin Harris, and William W. Stead as members of the Commission on Systemic Interoperability. Personnel Announcement on October 8, 40 Weekly Comp. Pres. Doc. 2285-86 (Oct. 8, 2004).

1. The President announced his intention to nominate Frederick William Hatfield to be a Commissioner of the Commodity Futures Trading Commission.

2. The President announced his intention to nominate Harold Damelin to be Inspector General of the Department of the Treasury.

3. The President announced his intention to nominate Edward L. Flippen to be Inspector General of the Corporation for National and Community Service.

4. The President announced his intention to nominate Brian David Miller to be Inspector General of the General Services Administration.

5. The President announced his intention to appoint Gen. Richard B. Myers, USAF, as a Governor on the Board of Governors of the American National Red Cross.

6. The President announced his intention to nominate Jorge A. Plasencia to be a member of the Advisory Board for Cuba Broadcasting.

7. The President announced his intention to nominate Carolyn L. Gallagher and Louis J. Giuliano to be Governors on the Board of Governors of the U.S. Postal Service.

8. The President announced his intention to appoint A. Wilson Greene and Katina P. Strauch as members of the National Museum and Library Services Board.

Personnel Announcement on October 15, 40 Weekly Comp. Pres. Doc. 2412 (Oct. 15, 2004).

1. The President announced his intention to designate Darrell Irions and Dee J. Kelly, Jr., as members of the Board of Governors on the United Service Organizations, Inc.

2. The President announced his intention to designate William A. Moorman as Acting Assistant Secretary of Veterans Affairs for Management.

Nominations Submitted To (66) or Withdrawn From (3) the Senate

Submitted September 7, 40 Weekly Comp. Pres. Doc. 1921 (Sept. 7, 2004).

1. Paul A. Crotty, of New York, to be U.S. District Judge for the Southern District of New York, vice Harold Baer, Jr., retiring.

2. Porter J. Goss, of Florida, to be Director of Central Intelligence, vice George John Tenet, resigned.

3. D. Michael Rappoport, of Arizona, to be a member of the Board of Trustees of the Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation for a term expiring October 6, 2008 (reappointment).

Submitted September 8, 40 Weekly Comp. Pres. Doc. 1922 (Sept. 8, 2004).

1. Catherine Todd Bailey, of Kentucky, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of Latvia.

2. Raymond F. DuBois, of the District of Columbia, to be Deputy Under Secretary of Defense for Logistics and Materiel Readiness, vice Diane K. Morales, resigned.

3. Howard J. Krongard, of New Jersey, to be Inspector General, Department of State, vice Clark Kent Ervin.

4. Douglas Menarchik, of Texas, to be an Assistant Administrator of the U.S. Agency for International Development, vice Patrick M. Cronin, resigned.

5. Thomas V. Skinner, of Illinois, to be an Assistant Administrator of the Environmental Protection Agency, vice John Peter Suarez, resigned.

Submitted September 10, 40 Weekly Comp. Pres. Doc. 1922-23 (Sept. 10, 2004).

1. Carin M. Barth, of Texas, to be Chief Financial Officer, Department of Housing and Urban Development, vice Angela Antonelli, resigned, to which position she was appointed during the last recess of the Senate.

2. Jonathan W. Dudas, of Virginia, to be Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office, vice James Edward Rogan, resigned, to which position he was appointed during the last recess of the Senate.

3. Albert A. Frink, Jr., of California, to be an Assistant Secretary of Commerce, vice Linda Mysliwy Conlin, resigned, to which position he was appointed during the last recess of the Senate.

4. Susan Johnson Grant, of Virginia, to be Chief Financial Officer, Department of Energy, vice Bruce Marshall Carnes, resigned, to which position she was appointed during the last recess of the Senate.

5. Ricardo H. Hinojosa, of Texas, to be Chair of the U.S. Sentencing Commission, vice Diana E. Murphy, resigned, to which position he was appointed during the last recess of the Senate.

6. Nadine Hogan, of Florida, to be a member of the Board of Directors of the Inter-American Foundation for a term

expiring June 26, 2008, vice Frank D. Yturria, resigned, to which position she was appointed during the last recess of the Senate.

7. Stephen L. Johnson, of Maryland, to be Deputy Administrator of the Environmental Protection Agency, vice Linda J. Fisher, resigned, to which position he was appointed during the last recess of the Senate.

8. Paul Jones, of Colorado, to be a member of the Internal Revenue Service Oversight Board for a term expiring September 14, 2008, vice Charles L. Kolbe, term expired, to which position he was appointed during the last recess of the Senate.

9. James R. Kunder, of Virginia, to be an Assistant Administrator of the U.S. Agency for International Development, vice Wendy Jean Chamberlin, resigned, to which position he was appointed during the last recess of the Senate.

10. Jon D. Leibowitz, of Maryland, to be a Federal Trade Commissioner for a term of 7 years from September 26, 2003, vice Mozelle Willmont Thompson, resigned, to which position he was appointed during the last recess of the Senate.

11. Deborah P. Majoras, of Virginia, to be a Federal Trade Commissioner for the unexpired term of 7 years from September 26, 2001, vice Timothy J. Muris, resigned, to which position she was appointed during the last recess of the Senate.

12. John D. Rood, of Florida, to be Ambassador Extraordinary and Plenipotentiary of the United States ofAmerica to the Commonwealth of The Bahamas, to which position he was appointed during the last recess of the Senate.

13. Enrique J. Sosa, of Florida, to be a member of the Reform Board (Amtrak) for a term of 5 years, vice Linwood Holton, term expired, to which position he was appointed during the last recess of the Senate.

14. Charles Graves Untermeyer, of Texas, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the State of Qatar, to which position he was appointed during the last recess of the Senate.

15. Jack Vaughn, of Texas, to be a member of the Board of Directors of the Inter-American Foundation for a term expiring September 20, 2006, vice Patricia Hill Williams, resigned, to which position he was appointed during the last recess of the Senate.

16. Gary Lee Visscher, of Maryland, to be a member of the Chemical Safety and Hazard Investigation Board for a term of 5 years, vice Isadore Rosenthal, term expired, to which position he was appointed during the last recess of the Senate.

17. Richard Kenneth Wagner, of Florida, to be a member of the National Institute for Literacy Advisory Board for a term expiring November 25, 2006, vice Robin Morris, term expired, to which position he was appointed during the last recess of the Senate.

18. Scott Kevin Walker, of Wisconsin, to be a member of the Advisory Board of the Saint Lawrence Seaway Development Corporation, vice Anthony S. Earl, resigned, to which position he was appointed during the last recess of the Senate.

19. Roger W. Wallace, of Texas, to be a member of the Board of Directors of the Inter-American Foundation for a term expiring October 6, 2008, vice Fred P. DuVal, to which position he was appointed during the last recess of the Senate.

20. Aldona Wos, of North Carolina, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of Estonia, to which position she was appointed during the last recess of the Senate.

21. Sean F. Cox, of Michigan, to be U.S. District Judge for the Eastern District of Michigan, vice Lawrence P. Zatkoff, retired.

Submitted September 13, 40 Weekly Comp. Pres. Doc. 2034 (Sept. 13, 2004).

1. Richard Greco, Jr., of New York, to be an Assistant Secretary of the Navy, vice Dionel M. Aviles.

2. Patrick J. Leahy, of Vermont, to be a Representative of the United States of America to the 59th Session of the General Assembly of the United Nations.

3. John E. Sununu, of New Hampshire, to be a Representative of the United States of America to the 59th Session of the General Assembly of the United Nations.

4. Ryan C. Crocker, of Washington, a career member of the Senior Foreign Service, class of Career Minister, for the personal rank of Career Ambassador in recognition of especially distinguished service over a sustained period.

5. Marc Isaiah Grossman, of Virginia, a career member of the Senior Foreign Service, class of Career Minister, for the personal rank of Career Ambassador in recognition of especially distinguished service over a sustained period.

6. A. Elizabeth Jones, of Maryland, a career member of the Senior Foreign Service, class of Career Minister, for the personal rank of Career Ambassador in recognition of especially distinguished service over a sustained period.

7. Alan Philip Larson, of Iowa, a career member of the Senior Foreign Service, class of Career Minister, for the personal rank of Career Ambassador in recognition of especially distinguished service over a sustained period.

8. Johnny Young, of Maryland, a career member of the Senior Foreign Service, class of Career Minister, for the personal rank of Career Ambassador in recognition of especially distinguished service over a sustained period.

Withdrawn September 13, 40 Weekly Comp. Pres. Doc. 2034 (Sept. 13, 2004).

1. Robert Jepson, of Georgia, to be a member of the Internal Revenue Service Oversight Board for a term expiring September 14, 2008, vice Karen Hastie Williams, term expired, which was sent to the Senate on December 9, 2003.

Submitted September 15, 40 Weekly Comp. Pres. Doc. 2034-35 (Sept. 15, 2004).

2. Arden Bement, Jr., of Indiana, to be Director of the National Science Foundation for a term of 6 years, vice Rita R. Colwell, resigned.

3. Michael J. Harrison, of Connecticut, to be an Assistant Secretary of Agriculture, vice Lou Gallegos, resigned.

4. Francis J. Harvey, of California, to be Secretary of the Army, vice Thomas E. White, resigned.

5. Pamela Hughes Patenaude, of New Hampshire, to be an Assistant Secretary of Housing and Urban Development, vice Romolo A. Bernardi.

6. J. Michael Seabright, of Hawaii, to be U.S. District Judge for the District of Hawaii, vice Alan C. Kay, retired.

Withdrawn September 15, 40 Weekly Comp. Pres. Doc. 2035 (Sept. 15, 2004).

1. Francis J. Harvey, of California, to be an Assistant Secretary of Defense, vice John P. Stenbit, which was sent to the Senate on November 6, 2003.

Submitted September 20, 40 Weekly Comp. Pres. Doc. 2141 (Sept. 20, 2004).

1. Jesus H. Delgado-Jenkins, of Illinois, to be an Assistant Secretary of the Treasury, vice Teresa M. Ressel, resigned.

2. Beryl A. Howell, of the District of Columbia, to be a member of the U.S. Sentencing Commission for the remainder of the term expiring October 31, 2005, vice Diana E. Murphy, resigned.

3. Susan L. Moore,of Texas, to be an Alternate Representative of the United States of America to the 59th Session of the General Assembly of the United Nations.
Submitted September 21, 40 Weekly Comp. Pres. Doc. 2141 (Sept 21, 2004).
1. William A. Moorman, of Virginia, to be a Judge of the U.S. Court of Appeals for Veterans Claims for the term of 15 years, vice Kenneth B. Kramer, term expired.
Submitted September 23, 40 Weekly Comp. Pres. Doc. 2141-42 (Sept. 23, 2004).
1. Dan Arvizu, of Colorado, to be a member of the National Science Board, National Science Foundation for a term expiring May 10, 2010, vice Maxine L. Savitz, term expired.
2. Steven C. Beering, of Indiana, to be a member of the National Science Board, National Science Foundation for a term expiring May 10, 2010 (reappointment).
3. Gerald Wayne Clough, of Georgia, to be a member of the National Science Board, National Science Foundation for a term expiring May 10, 2010, vice Anita K. Jones, term expired.
4. Ryan C. Crocker, of Washington, a career member of the Senior Foreign Service, class of Career Minister, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Islamic Republic of Pakistan.
5. Kelvin Kay Droegemeier, of Oklahoma, to be a member of the National Science Board, National Science Foundation for a term expiring May 10, 2010, vice Robert C. Richardson, term expired.
6. Louis J. Lanzerotti, of New Jersey, to be a member of the National Science Board, National Science Foundation for a term expiring May 10, 2010, vice George M. Langford, term expired.

7. Alan I. Leshner, of Maryland, to be a member of the National Science Board, National Science Foundation for a term expiring May 10, 2010, vice Luis Sequeira,term expired.
8. Buddie J. Penn, of Virginia, to be an Assistant Secretary of the Navy, vice H.T. Johnson.
9. Marcie B. Ries,of the District of Columbia, a career member of the Senior Foreign Service, class of Minister-Counselor, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of Albania.
10. Jon C. Strauss, of California, to be a member of the National Science Board, National Science Foundation for a term expiring May 10, 2010, vice Joseph A. Miller, Jr., term expired.
11. Kathryn D. Sullivan, of Ohio, to be a member of the National Science Board, National Science Foundation for a term expiring May 10, 2010, vice Pamela A. Ferguson.
Submitted October 5, 40 Weekly Comp. Pres. Doc. 2286 (Oct. 5, 2004).
1. Michael Butler, of Tennessee, to be a member of the Board of Trustees of the Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation for a term expiring October 6, 2008, vice Eric D. Eberhard, term expired.
2. Ronald Rosenfeld, of Oklahoma, to be a Director of the Federal Housing Finance Board for the remainder of the term expiring February 27, 2009, vice John Thomas Korsmo, resigned.
Submitted October 7, 40 Weekly Comp. Pres. Doc. 2286 (Oct. 7, 2004).
1. Harold Damelin, of Virginia, to be Inspector General, Department of the Treasury, vice Jeffrey Rush, Jr., resigned.

2. Edward L. Flippen, of Virginia, to be Inspector General, Corporation for National and Community Service, vice J. Russell George.

3. Frederick William Hatfield, of California, to be a Commissioner of the Commodity Futures Trading Commission for the term expiring April 13, 2008, vice Thomas J. Erickson, term expired.

4. Brian David Miller, of Virginia, to be Inspector General, General Services Administration, vice Daniel R. Levinson.

5. Jorge A. Plasencia, of Florida, to be a member of the Advisory Board for Cuba Broadcasting for a term expiring October 27, 2006, vice Joseph Francis Glennon, term expired.

Withdrawn October 7, 40 Weekly Comp. Pres. Doc. 2286 (Oct. 7, 2004).

1. James B. Cunningham, of Pennsylvania, a career member of the Senior Foreign Service, class of Career Minister, to be Representative of the United States of America to the Vienna office of the United Nations, with the rank of Ambassador, and to be Representative of the United States of America to the International Atomic Energy Agency, with the rank of Ambassador, which were sent to the Senate on April 8, 2004.

Submitted October 8, 40 Weekly Comp. Pres. Doc. 2286 (Oct. 8, 2004).

1. Carolyn L. Gallagher, of Texas, to be a Governor of the U.S. Postal Service for the remainder of the term expiring December 8, 2005, vice Erensta Ballard, resigned.

2. Louis J. Giuliano, of New York, to be a Governor of the U.S. Postal Service for a term expiring December 8, 2009, vice Albert Casey.

Declared Federal Emergencies or Major Disasters (26)

1. Declared Major Disaster in the Commonwealth of Virginia, 40 Weekly Comp. Pres. Doc. 1817 (Sept. 3, 2004).
2. Declared Major Disaster in Florida, 40 Weekly Comp. Pres. Doc. 1920 (Sept. 4, 2004).
3. Declared Major Disaster in North Carolina, 40 Weekly Comp. Pres. Doc. 1921 (Sept. 10, 2004).
4. Declared Major Disaster in South Carolina, 40 Weekly Comp. Pres. Doc. 2033 (Sept. 16, 2004).
5. Declared Major Disaster in Alabama, 40 Weekly Comp. Pres. Doc. 2033 (Sept. 16, 2004).
6. Declared Major Disaster in Florida, 40 Weekly Comp. Pres. Doc. 2033 (Sept. 16, 2004).
7. Declared Major Disaster in Louisiana, 40 Weekly Comp. Pres. Doc. 2033 (Sept. 16, 2004).
8. Declared Major Disaster in Mississippi, 40 Weekly Comp. Pres. Doc. 2033 (Sept. 16, 2004).
9. Declared Major Disaster in Georgia, 40 Weekly Comp. Pres. Doc. 2139 (Sept. 18, 2004).
10. Declared Major Disaster in North Carolina, 40 Weekly Comp. Pres. Doc. 2139 (Sept. 18, 2004).
11. Declared Two Major Disasters in the Commonwealth of Pennsylvania, 40 Weekly Comp. Pres. Doc. 2139-40 (Sept. 19, 2004).
12. Declared Major Disaster in West Virginia, 40 Weekly Comp. Pres. Doc. 2140 (Sept. 20, 2004).
13. Declared Major Disaster in Vermont, 40 Weekly Comp. Pres. Doc. 2140 (Sept. 23, 2004).
14. Declared Major Disaster in Georgia, 40 Weekly Comp. Pres. Doc. 2141 (Sept. 24, 2004).
15. Declared Major Disaster in Florida, 40 Weekly Comp. Pres. Doc. 2205 (Sept. 26, 2004).
16. Declared Major Disaster in Kansas, 40 Weekly Comp. Pres. Doc. 2206 (Sept. 30, 2004).

17. Declared Two Major Disasters in New York, 40 Weekly Comp. Pres. Doc. 2284 (Oct. 2, 2004).

18. Declared Major Disaster in New Jersey, 40 Weekly Comp. Pres. Doc. 2284 (Oct. 2, 2004).

19. Declared Increase in Federal Funding Available for Previous Major Disaster in Florida, 40 Weekly Comp. Pres. Doc. 2286 (Oct. 7, 2004).

20. Declared Major Disaster in South Carolina, 40 Weekly Comp. Pres. Doc. 2286 (Oct. 7, 2004).

21. Declared Major Disaster in Minnesota, 40 Weekly Comp. Pres. Doc. 2286 (Oct. 7, 2004).

22. Declared Major Disaster in the U.S. Virgin Islands, 40 Weekly Comp. Pres. Doc. 2286 (Oct. 7, 2004).

23. Declared Major Disaster in Tennessee, 40 Weekly Comp. Pres. Doc. 2286 (Oct. 7, 2004).

24. Declared Major Disaster in the Commonwealth of Virginia, 40 Weekly Comp. Pres. Doc. 2529 (Oct. 18, 2004)

Communications to Congress (12)

1. Supplemental budget request to support comprehensive response and recovery efforts after Hurricane Charley, letter transmitting, 40 Weekly Comp. Pres. Doc. 1856 (Sept. 6, 2004).

2. Budget amendments, letter transmitting, 40 Weekly Comp. Pres. Doc. 1894 (Sept. 7, 2004)

3. Iraq, notification of intent to designate as a beneficiary developing country for purposes of the Generalized System of Preferences, message transmitting, 40 Weekly Comp. Pres. Doc. 1894 (Sept. 7, 2004)

4. Barbados-U.S. Taxation Convention, message transmitting second protocol amending, 40 Weekly Comp. Pres. Doc. 1980 (Sept. 13, 2004).

5. Emergency supplemental appropriations requests, letter transmitting, 40 Weekly Comp. Pres. Doc. 1994 (Sept. 14, 2004).

6. Libya, message on termination of national emergency, 40 Weekly Comp. Pres. Doc. 2607 (Sept. 20, 2004)

7. Terrorism, message on continuation of national emergency with respect to persons who commit, threaten to commit, or support, 40 Weekly Comp. Pres. Doc. 2083 (Sept. 21, 2004).

8. Energy Department, letter transmitting budget amendment, 40 Weekly Comp. Pres. Doc. 2139 (Sept. 24, 2004).

9. Budget request to support comprehensive response and recovery efforts after Hurricane Jeanne, 40 Weekly Comp. Pres. Doc. 2262 (Oct. 5, 2004).

10. Budget request to support comprehensive response and recovery efforts after Hurricane Jeanne, 40 Weekly Comp. Pres. Doc. 2262 (Oct. 5, 2004)

11. Terrorist attacks on the United States, continuation of the national emergency, message transmitting notice, 40 Weekly Comp. Pres. Doc. 1919 (Sept. 10, 2004).

12. Letter to Congressional Leaders on Continuation of the National Emergency With Respect to Significant Narcotics Traffickers Centered in Colombia, 40 Weekly Comp. Pres. Doc. 2476 (Oct. 19, 2004).

Communications to Federal Agencies (21)

1. Combined Federal Campaign, memorandum, 40 Weekly Comp. Pres. Doc. 1863 (Sept. 6, 2004).

2. Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, memorandum, 40 Weekly Comp. Pres. Doc. 1917 (Sept. 10, 2004).

3. Presidential Determination and Certification Concerning Libya Under Sections of the Arms Export Control

Act and Determination on Export-Import Bank Support for U.S. Exports to Libya, memorandum, 40 Weekly Comp. Pres. Doc. 1917 (Sept. 10, 2004).

4. Presidential Determination With Respect to Foreign Governments' Efforts Regarding Trafficking in Persons, memorandum, 40 Weekly Comp. Pres. Doc. 1918 (Sept. 10, 2004).

5. Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for FY05, 40 Weekly Comp. Pres. Doc. 1998 (Sept. 15, 2004).

6. Intention to Grant Waiver of the Application of Section 901(j) of the Internal Revenue Code with Respect to Libya, memorandum, 40 Weekly Comp. Pres. Doc. 2068 (Sept. 20, 2004).

7. Determination and Waiver of Application of Section 908(a)(1) of the Trade Sanctions Reform and Export Enhancement Act of 2000 with Respect to Libya, memorandum, 40 Weekly Comp. Pres. Doc. 2169 (Sept. 20, 2004).

8. Government-to-Government Relationship with Tribal Governments, memorandum, 40 Weekly Comp. Pres. Doc. 2106 (Sept. 23, 2004).

9. Presidential Determination on Eligibility of the African Union to Receive Defense Articles and Services Under the Foreign Assistance Act of 1961, as Amended, and the Arms Export Control Act, as Amended, 40 Weekly Comp. Pres. Doc. 2131 (Sept. 24, 2004).

10. Certification Permitting Rescission of Iraq as a Sponsor of Terrorism, memorandum, 40 Weekly Comp. Pres. Doc. 2138 (Sept. 24, 2004).

11. Determination to Make Available Assistance for Sudan, memorandum, 40 Weekly Comp. Pres. Doc. 2138 (Sept. 24, 2004).

12. Transfer of Funds under Section 610 of the Foreign Assistance Program, 40 Weekly Comp. Pres. Doc. 2198 (Sept. 30, 2004).

13. Presidential Determination on FY 2005 Refugee Admissions Numbers and Authorizations of In-Country Refugee Status Pursuant to Sections 207 and 101(a)(42), respectively, of the Immigration and Nationality Act, and Determination Pursuant to Section 2(b)(2) of the Migration and Refugee Assistance Act, as Amended, 40 Weekly Comp. Pres. Doc. 2197 (Oct. 1, 2004).

14. Determination pursuant to 2(c)(1) of the Migration Refugee Assistance Act, 40 Weekly Comp. Pres. Doc. 2284 (Oct. 7, 2004).

15. Waiver and Certification of Statutory Provisions Regarding the Palestine Liberation Organization, 40 Weekly Comp. Pres. Doc. 2415 (Oct. 14, 2004).

16. Waiver and Certification of Statutory Provisions Regarding the Palestine Liberation Organization, 40 Weekly Comp. Pres. Doc. 2415 (Oct. 14, 2004).

17. Provision of U.S. Drug Interdiction Assistance to the Government of Brazil, 40 Weekly Comp. Pres. Doc. 2444 (Oct. 15, 2004).

18. Presidential Determination on Use of Cooperative Threat Reduction Funds in Albania Under Section 1308 of the National Defense Authorization Act for Fiscal Year 2004, 40 Weekly Comp. Pres. Doc. 2507 (Oct. 20, 2004).

19. Presidential Determination Relating to Obligation of Cooperative Threat Reduction Funds in Albania Under Section 1308 of the National Defense Authorization Act for Fiscal Year 2004, 40 Weekly Comp. Pres. Doc. 2508 (Oct. 20, 2004).

20. Delegation of Certain Functions Related to the Sudan Peace Act, 40 Weekly Comp. Pres. Doc. 2521 (Oct. 21, 2004).

21. Designation and Authorization To Perform Functions Under Section 319F-2 of the Public Health Service Act, 40 Weekly Comp. Pres. Doc. 2522 (Oct. 21, 2004).

Executive Notices (3)

1. Continuation of the National Emergency With Respect to Certain Terrorist Attacks, 40 Weekly Comp. Pres. Doc. 1919 (Sept. 10, 2004)

2. Continuation of the National Emergency With Respect to Persons Who Commit, Threaten To Commit, or Support Terrorism, 40 Weekly Comp. Pres. Doc. 2084 (Sept. 21, 2004).

3. Continuation of the National Emergency With Respect to Significant Narcotics Traffickers Centered in Colombia, 40 Weekly Comp. Pres. Doc. 2475 (Oct. 19, 2004).

Statements (12)

1. Statement Regarding the Millennium Challenge Account, 40 Weekly Comp. Pres. Doc. 2024 (Sept. 16, 2004)

2. Statement on U.S. Commission on Ocean Policy, final report, 40 Weekly Comp. Pres. Doc. 2066 (Sept. 21, 2004)

3. Statement on the Senate confirmation of Porter J. Goss as Director of Central Intelligence, 40 Weekly Comp. Pres. Doc. 2104 (Sept. 21, 2004)

4. Statement on the Congressional passage of legislation to extend tax relief, 40 Weekly Comp. Pres. Doc. 2125 (Sept. 21, 2004)

5. Joint Statement United States of America and the Islamic Republic of Pakistan, 40 Weekly Comp. Pres. Doc. 2104 (Sept. 23, 2004)

6. Statement to the House of Representatives on a constitutional amendment on marriage, 40 Weekly Comp. Pres. Doc. 2175 (Sept. 30, 2004).

7. Statement Regarding the House of Representatives Action on Legislation to Reinstate the Draft, 40 Weekly Comp. Pres. Doc. 2261 (Oct. 5, 2004)

8. Statement Regarding the Death of Gordon Cooper, 40 Weekly Comp. Pres. Doc. 2261 (Oct. 5, 2004)

9. Statement Regarding Senate Passage of the National Intelligence Reform Act, 40 Weekly Comp. Pres. Doc. 2274 (Oct. 6, 2004)

10. Statement Regarding Terrorist Attacks in Egypt, 40 Weekly Comp. Pres. Doc. 2284 (Oct. 8, 2004)

11. Statement Regarding the Death of Christopher Reeve, 40 Weekly Comp. Pres. Doc. 2350 (Oct. 11, 2004).

12. Statement at Leyte Island on the anniversary of the Allied landing, 40 Weekly Comp. Pres. Doc. 2475 (Oct. 19, 2004).

Remarks After Meetings With Foreign Leaders (8)

1. U.N. General Assembly in New York City, 40 Weekly Comp. Pres. Doc. 2075 (Sept. 21, 2004).

2. Meeting with Prime Minister Singh of India, 40 Weekly Comp. Pres. Doc. 2075 (Sept. 21, 2004).

3. Meeting with Prime Minister Allawi of Iraq, 40 Weekly Comp. Pres. Doc. 2080 (Sept. 21, 2004).

4. Luncheon with U.N. Secretary Annan in New York City, 40 Weekly Comp. Pres. Doc. 2082 (Sept. 21, 2004).

5. Reception for Heads of State in New York City, 40 Weekly Comp. Pres. Doc. 2084 (Sept. 21, 2004).

6. Meeting with President Musharraf of Pakistan, 40 Weekly Comp. Pres. Doc. 2104 (Sept. 22, 2004).

7. Meeting with Prime Minister Allawi of Iraq, 40 Weekly Comp. Pres. Doc. 2107 (Sept. 23, 2004).

8. News Conference with Prime Minister Allawi of Iraq, 40 Weekly Comp. Pres. Doc. 2107 (Sept. 23, 2004).

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1. Remarks in Cedar Rapids, Iowa, 40 Weekly Comp. Pres. Doc. 1819 (Sept. 3, 2004).

2. Remarks in Erie, Pennsylvania, 40 Weekly Comp. Pres. Doc. 1845 (Sept. 4, 2004).

3. Discussion in Broadview Heights, Ohio, 40 Weekly Comp. Pres. Doc. 1824 (Sept. 4, 2004).

4. Remarks in Kirtland, Ohio, 40 Weekly Comp. Pres. Doc. 1839 (Sept. 4, 2004).

5. Remarks in Parkersburg, West Virginia, 40 Weekly Comp. Pres. Doc. 1851 (Sept. 5, 2004).

6. Remarks in Poplar Bluff, Missouri, 40 Weekly Comp. Pres. Doc. 1857 (Sept. 6, 2004).

7. Remarks in Columbia, Missouri, 40 Weekly Comp. Pres. Doc. 1886 (Sept. 7, 2004).

8. Remarks in Lees Summit, Missouri, 40 Weekly Comp. Pres. Doc. 1863 (Sept. 7, 2004).

9. Discussion in Sedalia, Missouri, 40 Weekly Comp. Pres. Doc. 1869 (Sept. 7, 2004).

10. Remarks in Johnstown, Pennsylvania, 40 Weekly Comp. Pres. Doc. 1903 (Sept. 9, 2004).

11. Remarks in Colmar, Pennsylvania, 40 Weekly Comp. Pres. Doc. 1896 (Sept. 9, 2004).

12. Remarks in Huntington, West Virginia, 40 Weekly Comp. Pres. Doc. 1910 (Sept. 10, 2004).

13. Remarks in Chillicothe, Ohio, 40 Weekly Comp. Pres. Doc. 1943 (Sept. 10, 2004).

14. Remarks in Portsmouth, Ohio, 40 Weekly Comp. Pres. Doc. 1925 (Sept. 10, 2004).

15. Remarks in Ironton, Ohio, 40 Weekly Comp. Pres. Doc. 1916 (Sept. 10, 2004).

16. Remarks in Battle Creek, Michigan, 40 Weekly Comp. Pres. Doc. 1973 (Sept. 13, 2004).

17. Remarks in Holland, Michigan, 40 Weekly Comp. Pres. Doc. 1966 (Sept. 13, 2004).

18. Remarks in Muskegon, Michigan, 40 Weekly Comp. Pres. Doc. 1966 (Sept. 13, 2004).

19. Remarks in Greenwood Village, Colorado, 40 Weekly Comp. Pres. Doc. 1981 (Sept. 14, 2004).

20. Remarks in St. Cloud, Minnesota, 40 Weekly Comp. Pres. Doc. 1987 (Sept. 16, 2004).

21. Victory Committee Reception, 40 Weekly Comp. Pres. Doc. 2025 (Sept. 17, 2004).

22. Remarks in Rochester, Minnesota, 40 Weekly Comp. Pres. Doc. 2018 (Sept. 17, 2004).

23. Discussion in Derry, New Hampshire, 40 Weekly Comp. Pres. Doc. 2050 (Sept. 20, 2004).

24. Rally in New York City, 40 Weekly Comp. Pres. Doc. 2069 (Sept. 20, 2004).

25. Remarks in Latrobe, Pennsylvania, 40 Weekly Comp. Pres. Doc. 2097 (Sept. 22, 2004).

26. Remarks in Racine, Wisconsin, 40 Weekly Comp. Pres. Doc. 2143 (Sept. 24, 2004).

27. Remarks in West Chester, Ohio, 40 Weekly Comp. Pres. Doc. 2164 (Sept. 27, 2004).

28. Remarks in Xenia, Ohio, 40 Weekly Comp. Pres. Doc. 2164 (Sept. 27, 2004).

29. Debate Watch Party in Coral Gables, Florida, 40 Weekly Comp. Pres. Doc. 2195 (Sept. 30, 2004).

30. Remarks in Stuart, Florida, 40 Weekly Comp. Pres. Doc. 2174 (Sept. 30, 2004).

31. Presidential Debate in Coral Gables, 40 Weekly Comp. Pres. Doc. 2175 (Sept. 30, 2004).

32. Remarks in Allentown, Pennsylvania, 40 Weekly Comp. Pres. Doc. 2198 (Oct. 1, 2004).

33. Remarks in Manchester, NH, 40 Weekly Comp. Pres. Doc. 2209 (Oct. 1, 2004).

34. Discussion in Mansfield, Ohio, 40 Weekly Comp. Pres. Doc. 2223 (Oct. 2, 2004).

35. Remarks in Cuyahoga Falls, Iowa, 40 Weekly Comp. Pres. Doc. 2235 (Oct. 2, 2004).

36. Discussion in Clive, IA, 40 Weekly Comp. Pres. Doc. 2244 (Oct. 4, 2004).

37. Remarks in Farmington Hills, Michigan, 40 Weekly Comp. Pres. Doc. 2268 (Oct. 6, 2004).

38. Remarks in Wilkes-Barre, PA, 40 Weekly Comp. Pres. Doc. 2262 (Oct. 6, 2004).

39. Departure for Wausau, 40 Weekly Comp. Pres. Doc. 2275 (Oct. 7, 2004).

40. Remarks in Wausau, 40 Weekly Comp. Pres. Doc. 2275 (Oct. 7, 2004).

41. Debate watch party in Ballwin, Missouri, 40 Weekly Comp. Pres. Doc. 2311 (Oct. 8, 2004).

42. Presidential Debate in St. Louis, Missouri, 40 Weekly Comp. Pres. Doc. 2289 (Oct. 8, 2004).

43. Remarks in Chanhannses, Minnesota, 40 Weekly Comp. Pres. Doc. 2324 (Oct. 9, 2004).

44. Breakfast for Gubernatorial Candidate Matt Blunt, St. Louis, Missouri, 40 Weekly Comp. Pres. Doc. 2312 (Oct. 9, 2004).

45. Remarks in Hobbs, New Mexico, 40 Weekly Comp. Pres. Doc. 2330 (Oct. 11, 2004).

46. Remarks in Morrison, Colorado, 40 Weekly Comp. Pres. Doc. 2344 (Oct. 11, 2004).

47. Luncheon for Senatorial Candidate Pete Coors in Denver, 40 Weekly Comp. Pres. Doc. 2338 (Oct. 11, 2004).

48. Remarks in Paradise Valley, Arizona, 40 Weekly Comp. Pres. Doc. 2359 (Oct. 12, 2004).

49. Debate watch party in Phoenix, Arizona, 40 Weekly Comp. Pres. Doc. 2384 (Oct. 13, 2004).

50. Presidential Debate, Tempe, Arizona, 40 Weekly Comp. Pres. Doc. 2364 (Oct. 13, 2004).

51. Remarks in Las Vegas, 40 Weekly Comp. Pres. Doc. 2387 (Oct. 14, 2004).

52. Remarks in Reno, Las Vegas, 40 Weekly Comp. Pres. Doc. 2393 (Oct. 14, 2004).

53. Remarks in Oshkosh, Wisconsin, 40 Weekly Comp. Pres. Doc. 2415 (Oct. 15, 2004).

54. Remarks in Cedar Rapids, Iowa, 40 Weekly Comp. Pres. Doc. 2405 (Oct. 15, 2004).

55. Remarks in Central Point, Oregon, 40 Weekly Comp. Pres. Doc. 2399 (Oct. 15, 2004).

56. Remarks in Sunrise, Florida, 40 Weekly Comp. Pres. Doc. 2425 (Oct. 16, 2004).

57. Remarks in Daytona Beach, Florida, 40 Weekly Comp. Pres. Doc. 2438 (Oct. 16, 2004).

58. Remarks in West Palm Beach, 40 Weekly Comp. Pres. Doc. 2432 (Oct. 16, 2004).

59. Remarks in New Port Richey, Florida, 40 Weekly Comp. Pres. Doc. 2463 (Oct. 19, 2004).

60. Remarks in St. Petersburg, Florida, 40 Weekly Comp. Pres. Doc. 2455 (Oct. 19, 2004)

61. Waterloo, Iowa, 40 Weekly Comp. Pres. Doc. 2318 (Oct. 19, 2004).

62. Remarks in The Village, Florida, 40 Weekly Comp. Pres. Doc. 2468 (Oct. 19, 2004).

63. Remarks in Mason City, Iowa, 40 Weekly Comp. Pres. Doc. 2476 (Oct. 20, 2004).

64. Remarks in Rochester, Minnesota, 40 Weekly Comp. Pres. Doc. 2483 (Oct. 20, 2004).

65. Discussion in Eau Claire, Wisconsin, 40 Weekly Comp. Pres. Doc. 2493 (Oct. 20, 2004).

66. Remarks in Downingtown, PA, 40 Weekly Comp. Pres. Doc. 2508 (Oct. 21, 2004).

67. Remarks in Hershey, PA, 40 Weekly Comp. Pres. Doc. 2515 (Oct. 21, 2004).

68. Remarks in Wilkes-Barre, PA, 40 Weekly Comp. Pres. Doc. 2522 (Oct. 22, 2004).

69. Remarks in Marlton, New Jersey, 40 Weekly Comp. Pres. Doc. 2446 (Oct. 22, 2004).

70. Remarks in Marlton, New Jersey, 40 Weekly Comp. Pres. Doc. 2452 (Oct. 22, 2004).

General Remarks (22)

1. Meeting with Congressional Leaders, 40 Weekly Comp. Pres. Doc. 1895 (Sept. 8, 2004).

2. Visit to the National Hurricane Center in Miami, 40 Weekly Comp. Pres. Doc. 1895 (Sept. 8, 2004).

3. Remarks on Intelligence Reform, 40 Weekly Comp. Pres. Doc. 1895 (Sept. 8, 2004).

4. Remarks on terrorist attacks in Russia, 40 Weekly Comp. Pres. Doc. 1953 (Sept. 12, 2004).

5. General Conference of the National Guard Association of United States in Las Vegas, NV, 40 Weekly Comp. Pres. Doc. 1987 (Sept. 14, 2004).

6. Message on Rosh Hashanah, 40 Weekly Comp. Pres. Doc. 1992 (Sept. 14, 2004).

7. Hispanic Heritage Month Reception, 40 Weekly Comp. Pres. Doc. 1995 (Sept. 15, 2004).

8. Discussion on Health Care in Blaine, Minnesota, 40 Weekly Comp. Pres. Doc. 2007 (Sept. 16, 2004).

9. Discussion on women's issue in Charlotte, North Carolina, 40 Weekly Comp. Pres. Doc. 2013 (Sept. 17, 2004).

10. Meeting with First Responders in Orange Beach, Alabama, 40 Weekly Comp. Pres. Doc. 2409 (Sept. 19, 2004).

11. Discussion on education in King of Prussia, Pennsylvania, 40 Weekly Comp. Pres. Doc. 2085 (Sept. 22, 2004).

12. Recovery efforts in Millvale, Pennsylvania, 40 Weekly Comp. Pres. Doc. 2095 (Sept. 22, 2004).

13. Opening of the National Museum of the Native American, 40 Weekly Comp. Pres. Doc. 2105 (Sept. 23, 2004).

14. Remarks to Army Reserve and National Guard troops departing for Iraq in Bangor Maine, 40 Weekly Comp. Pres. Doc. 2117 (Sept. 23, 2004).

15. Relief efforts for Beslan, Russia, 40 Weekly Comp. Pres. Doc. 2126 (Sept. 24, 2004).

16. Discussion on Education, Janesville, Wisconsin, 40 Weekly Comp. Pres. Doc. 2126 (Sept. 24, 2004).

17. Discussion on Education in Springfield, Ohio, 40 Weekly Comp. Pres. Doc. 2152 (Sept. 27, 2004).

18. Inspection of Hurricane Damage in Lake Wales, 40 Weekly Comp. Pres. Doc. 2173 (Sept. 29, 2004).

19. National Association of Homebuilders in Columbus, Ohio, 40 Weekly Comp. Pres. Doc. 2217 (Oct. 2, 2004).

20. Report on Iraq's weapons of mass destruction, 40 Weekly Comp. Pres. Doc. 2275 (Oct. 7, 2004).

21. Ramadan Message, 40 Weekly Comp. Pres. Doc. 2411 (Oct. 15, 2004).

22. Address to U.S. Olympic and Paralympic Teams, 40 Weekly Comp. Pres. Doc. 2445 (Oct. 18, 2004).

Radio Addresses (7)

1. Radio Address, 40 Weekly Comp. Pres. Doc. 1839 (Sept. 4, 2004).

2. Radio Address, 40 Weekly Comp. Pres. Doc. 1952 (Sept. 11, 2004).

3. Radio Address, 40 Weekly Comp. Pres. Doc. 2048 (Sept. 18, 2004).

4. Radio Address, 40 Weekly Comp. Pres. Doc. 2151 (Sept. 25, 2004).

5. Radio Address, 40 Weekly Comp. Pres. Doc. 2222 (Oct. 2, 2004).

6. Radio Address, 40 Weekly Comp. Pres. Doc. 2389 (Oct. 14, 2004).

7. Radio Address, 40 Weekly Comp. Pres. Doc. 2424 (Oct. 16, 2004).

Other Media (2)

1. Exchange with Reporters in New York City, 40 Weekly Comp. Pres. Doc. 2080 (Sept. 21, 2004).

2. Exchange with reporters aboard Air Force One, 40 Weekly Comp. Pres. Doc. 2386 (Oct. 14, 2004).

2006 EXECUTIVE ACTIONS

Executive Orders (3)

1. Executive Order: Blocking Property of and Prohibiting Transactions with the Government of Sudan, 42 Weekly Comp. Pres. Doc. 1824 (Oct. 13, 2006)

2. Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of the Congo, Exe. Order. No. 13, 413, 71 Fed. Reg. 105 (Oct. 31, 2006).

3. Executive Order 13, 414—Amendments to Executive Order 13, 402, Strengthening Federal Efforts to Protect Against Identify Theft, 42 Weekly Comp. Pres. Doc. 1984 (Nov. 3, 2006).

Proclamations (35)

1. Proclamation 8047: Patriot Day, 2006, 42 Weekly Comp. Pres. Doc. 1589 (Sept. 7, 2006).

2. Proclamation 8048: National Historically Black Colleges and Universities Week, 2006, 42 Weekly Comp. Pres. Doc. 1595 (Sept. 8, 2006).

3. Proclamation 8049: National Hispanic Heritage Month, 2006, 42 Weekly Comp. Pres. Doc. 1605 (Sept. 14, 2006).

4. Proclamation 8050: Constitution Day and Citizenship Day, Constitution Week, 2006, Weekly Comp. Pres. Doc. 1606 (Sept. 14, 2006).

5. Proclamation 8051: National POW / MIA Recognition Day, 2006, 42 Weekly Comp. Pres. Doc. 1607 (Sept. 14, 2006).

6. Proclamation 8052: National Farm Safety and Health Week, 2006, 42 Weekly Comp. Pres. Doc. 1625 (Sept. 15, 2006).

7. Proclamation 8053: Literacy Day, 2006, 42 Weekly Comp. Pres. Doc. 1625 (Sept. 15, 2006).

8. Proclamation 8054: Gold Star Mother's Day, 2006, 42 Weekly Comp. Pres. Doc. 1640 (Sept. 20, 2006).

9. Proclamation 8055: National Employer Support of the Guard and Reserve Week, 2006, 42 Weekly Comp. Pres. Doc. 1651 (Sept. 21, 2006).

10. Proclamation 8056: Family Day, 2006, 42 Weekly Comp. Pres. Doc. 1663 (Sept. 22, 2006).

11. Proclamation 8057: Child Health Day, 2006, 42 Weekly Comp. Pres. Doc. 1687 (Sept. 28, 2006)

12. Proclamation 8058: National Domestic Violence Awareness Month, 2006, 42 Weekly Comp. Pres. Doc. 1704 (Sept. 29, 2006).

13. Proclamation 8059: National Breast Cancer Awareness Month, 2006, 42 Weekly Comp. Pres. Doc. 1732 (Oct. 3, 2006).

14. Proclamation 8060: National Disability Employment Awareness Month, 2006, 42 Weekly Comp. Pres. Doc. 1733 (Oct. 3, 2006).

15. Proclamation 8061: German-American Day, 2006, 42 Weekly Comp. Pres. Doc. 1733 (Oct. 3, 2006).

16. Proclamation 8062: Fire Prevention Week, 2006, 42 Weekly Comp. Pres. Doc. 1756 (Oct. 4, 2006).

17. Proclamation 8063: Leif Erikson Day, 2006, 42 Weekly Comp. Pres. Doc. 1749 (Oct. 4, 2006).

18. Proclamation 8064: National School Lunch Week, 2006, 42 Weekly Comp. Pres. Doc. 1755 (Oct. 5, 2006).

19. Proclamation 8065: Columbus Day, 2006, 42 Weekly Comp. Pres. Doc. 1756 (Oct. 5, 2006).

20. Proclamation 8066: General Pulaski Memorial Day, 2006, 42 Weekly Comp. Pres. Doc. 1799 (Oct. 11, 2006).

21. Proclamation 8067: To Modify Rules of Origin Under the North Atlantic Free Trade Agreement, 42 Weekly Comp. Pres. Doc. 1800 (Oct. 11, 2006).

22. Proclamation 8068: National Energy Awareness Month, 2006, 42 Weekly Comp. Pres. Doc. 1813 (Oct. 12, 2006).

23. Proclamation 8069: White Cane Safety Day, 2006, 42 Weekly Comp. Pres. Doc. 1814 (Oct. 12, 2006).

24. Proclamation 8070: National Character Counts Week, 2006, 42 Weekly Comp. Pres. Doc. 1823 (Oct. 13, 2006).

25. Proclamation 8071: National Forest Products Week, 2006, 42 Weekly Comp. Pres. Doc. 1823 (Oct. 13, 2006).

26. Proclamation 8072: 50th Anniversary of the Hungarian Revolution, 2006, 42 Weekly Comp. Pres. Doc. 1844 (Oct. 18, 2006).

27. Proclamation 8073: United Nations Day, 2006, 42 Weekly Comp. Pres. Doc. 1867 (Oct. 20, 2006).

28. Proclamation 8074: National Adoption Month, 2006, 42 Weekly Comp. Pres. Doc. 1929 (Oct. 30, 2006).

29. Proclamation 8075: National Alzheimer's Disease Awareness Month, 2006, 42 Weekly Comp. Pres. Doc. 1930 (Oct. 30, 2006).

30. Proclamation 8076: National American Indian Heritage Month, 2006, 42 Weekly Comp. Pres. Doc. 1930 (Oct. 30, 2006).

31. Proclamation 8077: National Diabetes Month, 2006, 42 Weekly Comp. Pres. Doc. 1931 (Oct. 30, 2006).

32. Proclamation 8078: National Family Caregivers Month, 2006, 42 Weekly Comp. Pres. Doc. 1932 (Oct. 30, 2006).

33. Proclamation 8079: National Hospice Month, 2006, 42 Weekly Comp. Pres. Doc. 1936 (Oct. 30, 2006).

34. Proclamation 8080: Veterans Day, 2006, 42 Weekly Comp. Pres. Doc. 1943 (Oct. 31, 2006).

35. Proclamation 8081: World Freedom Day, 2006, 42 Weekly Comp. Pres. Doc. 1958 (Nov. 2, 2006).

Signed Legislation (91)

1. President Bush signs YouthBuild Transfer Act, S. 3534 / Public Law 109-281, 42 Weekly Comp. Pres. Doc. 1662 (Sept. 22, 2006).

2. President Bush signs Federal Funding Accountability and Transparency Act of 2006, S. 2590 / Public Law 109-282, 42 Weekly Comp. Pres. Doc. 1701 (Sept. 26, 2006).

3. President Bush signs United States-Oman Free Trade Agreement Implementation Act, H.R. 5684 / Public Law 109-283, 42 Weekly Comp. Pres. Doc. 1701 (Sept. 26, 2006).

4. President Bush signs Federal Funding Accountability and Transparency Act of 2006, 42 Weekly Comp. Pres. Doc. 1666 (Sept. 26, 2006).

5. President Bush signs act To make technical corrections to the United States Code, H.R. 866 / Public Law 109-284, 42 Weekly Comp. Pres. Doc. 1701 (Sept. 27, 2006).

6. President Bush signs Abraham Lincoln Commemorative Coin Act, H.R. 2808 / Public Law 109-285, 42 Weekly Comp. Pres. Doc. 1701 (Sept. 27, 2006).

7. President Bush signs Pueblo de San Ildefonso Claims Settlement Act of 2005, S. 1773 / Public Law 109-286, 42 Weekly Comp. Pres. Doc. 1701 (Sept. 27, 2006).

8. President Bush signs Fourteenth Dalai Lama Congressional Gold Medal Act, S. 2784 / Public Law 109-287, 42 Weekly Comp. Pres. Doc. 1701 (Sept. 27, 2006).

9. President Bush signs Child and Family Services Improvement Act of 2006, S. 3525 / Public Law 109-288, 42 Weekly Comp. Pres. Doc. 1701 (Sept. 28, 2006).

10. President Bush signs Department of Defense Appropriations Act, 2007, H.R. 5631 / Public Law 109-289, 42 Weekly Comp. Pres. Doc. 1701 (Sept. 29, 2006).

11. President Bush signs Military Personnel Financial Services Protection Act, S. 418 / Public Law 109-290, 42 Weekly Comp. Pres. Doc. 1701 (Sept. 29, 2006).

12. President Bush signs Credit Rating Agency Reform Act of 2006, S. 3850 / Public Law 109-291, 42 Weekly Comp. Pres. Doc. 1701 (Sept. 29, 2006).

13. President Bush signs "Department of Defense Appropriations Act, 2007," H.R. 5631, 42 Weekly Comp. Pres. Doc. 1703 (Sept. 29, 2006).

14. President ~~Bush signs~~ Third Higher Education Extension Act of 2006, H.R. 6138 / Public Law 109-292, 42 Weekly Comp. Pres. Doc. 1762 (Sept. 30, 2006).

15. President Bush signs Iran Freedom Support Act, H.R. 6198 / Public Law 109-293, 42 Weekly Comp. Pres. Doc. 1762 (Sept. 30, 2006).

16. President Bush signs Partners for Fish and Wildlife Act, S. 260 / Public Law 109-294, 42 Weekly Comp. Pres. Doc. 1762 (Oct. 3, 2006).

17. President Bush signs "Department of Homeland Security Appropriations Act, 2007," H.R. 5441/Public Law 109-295, 42 Weekly Comp. Pres. Doc. 1742 (Oct. 4, 2006).

18. President Bush signs Act To reauthorize the Livestock Mandatory Reporting Act of 1999 and to amend the swine

reporting provisions of that Act, H.R. 3408 / Public Law 109-296, 42 Weekly Comp. Pres. Doc. 1762 (Oct. 5, 2006).

19. President Bush signs Act To extend the deadline for commencement of construction of a hydroelectric project in the State of Alaska, S. 176 / Public Law109-297, 42 Weekly Comp. Pres. Doc. 1762 (Oct. 5, 2006).

20. President Bush Signs Act To extend the deadline for commencement of construction of a hydroelectric project in the State of Wyoming, S. 244 / Public Law 109-298, 42 Weekly Comp. Pres. Doc. 1762 (Oct. 5, 2006).

21. President Bush signs the Wichita Project Equus Beds Division Authorization Act of 2005, S. 1025 / Public Law 109-299, 42 Weekly Comp. Pres. Doc. 1762 (Oct. 5, 2006).

22. President Bush signs act to designate the facility of the United States Postal Service located at 7172 North Tongass Highway, Ward Cove, Alaska, as the "Alice R. Brusich Post Office Building," S. 1275 / Public Law 109-300, 42 Weekly Comp. Pres. Doc. 1762 (Oct. 5, 2006).

23. President Bush signs act to designate the facility of the United States Postal Service located on Lindbald Avenue, Girdwood, Alaska, as the "Dorothy and Connie Hibbs Post Office Building," S. 1323 / Public Law 109-301, 42 Weekly Comp. Pres. Doc. 1763 (Oct. 5, 2006).

24. President Bush signs act to designate the facility of the United States Postal Service located at 8801 Sudley Road in Manassas, Virginia, as the "Harry J. Parrish Post Office," S. 2690 / Public Law 109-302, 42 Weekly Comp. Pres. Doc. 1763 (Oct. 5, 2006).

25. President Bush signs Copyright Royalty Judges Program Technical Corrections Act, H.R. 1036 / Public Law 109-303, 42 Weekly Comp. Pres. Doc. 1763 (Oct. 6, 2006).

26. President Bush signs act to complete the codification of title 46, United States Code, "Shipping", as positive law, H.R.

1442 / Public Law 109-304, 42 Weekly Comp. Pres. Doc. 1763 (Oct. 6, 2006).

27. President Bush signs Railroad Retirement Technical Improvement Act of 2006, H.R. 5074 / Public Law 109-305, 42 Weekly Comp. Pres. Doc. 1763 (Oct. 6, 2006).

28. President Bush signs act to amend the John F. Kennedy Center Act to authorize additional appropriations for the John F. Kennedy Center for the Performing Arts for fiscal year 2007, H.R. 5187 / Public Law 109-306, 42 Weekly Comp. Pres. Doc. 1763 (Oct. 6, 2006).

29. President Bush signs Children's Hospital GME Support Reauthorization Act of 2006, H.R. 5574 / Public Law 109-307, 42 Weekly Comp. Pres. Doc. 1763 (Oct. 6, 2006).

30. President Bush signs Pets Evacuation and Transportation Standards Act of 2006, H.R. 3858 / Public Law 109-308, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 6, 2006).

31. President Bush signs act to amend the Ojito Wilderness Act to make a technical correction, H.R. 4841 / Public Law 109-309, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 6, 2006).

32. President Bush signs act to designate the Post Office located at 5755 Post Road, East Greenwich, Rhode Island, as the "Richard L. Cevoli Post Office," S. 3187 / Public Law 109-310, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 6, 2006).

33. President Bush signs act to designate the facility of the United States Postal Service located at 2951 New York Highway 43 in Averill Park, New York, as the "Major George Quamo Post Office Building," S. 3613 / Public Law 109-311, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 6, 2006).

34. President Bush signs Trademark Dilution Revision Act of 2006, H.R. 683 / Public Law 109-312, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 6, 2006).

35. President Bush signs General Services Administration Modernization Act, H.R. 2066 / Public Law 109-313, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 6, 2006).

36. President Bush signs National Law Enforcement Officers Memorial Maintenance Fund Act of 2005, H.R. 2107 / Public Law 109-314, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 6, 2006).

37. President Bush signs act to designate the facility of the United States Postal Service located at 110 Cooper Street in Babylon, New York, as the "Jacob Samuel Fletcher Post Office Building," H.R. 5664 / Public Law 109-315, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 10, 2006).

38. President Bush signs act to extend temporarily certain authorities of the Small Business Administration, H.R. 6159 / Public Law 109-316, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 10, 2006).

39. President Bush authorizes the Secretary of the Interior to study the suitability and feasibility of designating Castle Nugent Farms located on St. Croix, Virgin Islands, as a unit of the National Park System, and for other purposes, H.R. 318 / Public Law 109-317, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 11, 2006).

40. President Bush signs act to amend the Yuma Crossing National Heritage Area Act of 2000 to adjust the boundary of the Yuma Crossing National Heritage Area, and for other purposes, H.R. 326 / Public Law 109-318, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 11, 2006).

41. President Bush signs Ste. Genevieve County National Historic Site Study Act of 2005, H.R. 1728 / Public Law 109-319, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 11, 2006).

42. President Bush signs Salt Cedar and Russian Olive Control Demonstration Act, H.R. 2720 / Public Law 109-320, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 11, 2006).

43. President Bush signs act to direct the Secretary of the Interior to convey certain water distribution facilities to the Northern Colorado Water Conservancy District, H.R. 3443 / Public Law 109-321, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 11, 2006).

44. President Bush signs North American Wetlands Conservation Reauthorization Act of 2006, H.R. 5539 / Public Law 109-322, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 11, 2006).

45. President Bush signs act To extend the waiver authority for the Secretary of Education under title IV, section 105, of Public Law 109-148, H.R. 6106 / Public Law 109-323, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 11, 2006).

46. President Bush signs Rio Arriba County Land Conveyance Act, S. 213 / Public Law 109-324, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 11, 2006).

47. President Bush signs act to extend relocation expenses test programs for Federal employees, S. 2146 / Public Law 109-325, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 11, 2006).

48. President Bush signs Great Lakes Fish and Wildlife Restoration Act of 2006, S. 2430 / Public Law 109-326, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 11, 2006).

49. President Bush signs act to designate the facility of the United States Postal Service located at 6101 Liberty Road in Baltimore, Maryland, as the "United States Representative Parren J. Mitchell Post Office," H.R. 4109 / Public Law 109-327, 42 Weekly Comp. Pres. Doc. 1821, (Oct. 12, 2006).

50. President Bush signs act to designate the facility of the United States Postal Service located at 110 North Chestnut Street in Olathe, Kansas, as the "Governor John Anderson, Jr. Post Office Building," H.R. 4674 / Public Law 109-328, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 12, 2006).

51. President Bush signs act to designate the facility of the United States Postal Service located at 350 Uinta Drive in Green River, Wyoming, as the "Curt Gowdy Post Office Building," H.R. 5224 / Public Law 109-329, 42 Weekly Comp. Pres. Doc. 1822 (Oct. 12, 2006).

52. President Bush signs act to designate the facility of the United States Postal Service located at 6029 Broadmoor Street in Mission, Kansas, as the "Larry Winn, Jr. Post Office Building," H.R. 5504 / Public Law 109-330, 42 Weekly Comp. Pres. Doc. 1822 (Oct. 12, 2006).

53. President Bush signs act to designate the United States courthouse to be constructed in Greenville, South Carolina, as the "Carroll A. Campbell, Jr. United States Courthouse," H.R. 5546 / Public Law 109-331, 42 Weekly Comp. Pres. Doc. 1822 (Oct. 12, 2006).

54. President Bush signs act to designate the Federal building and United States courthouse located at 221 and 211 West Ferguson Street in Tyler, Texas, as the "William M. Steger Federal Building and United States Courthouse," H.R. 5606 / Public Law 109-332, 42 Weekly Comp. Pres. Doc. 1822 (Oct. 12, 2006).

55. President Bush signs act to designate the facility of the United States Postal Service located at 950 Missouri Avenue in East St. Louis, Illinois, as the "Katherine Dunham Post Office Building," H.R. 5929 / Public Law 109-333, 42 Weekly Comp. Pres. Doc. 1822 (Oct. 12, 2006).

56. President Bush signs act to designate the facility of the United States Postal Service located at 39-25 61st Street in Woodside, New York, as the "Thomas J. Manton Post Office Building," H.R. 6033 / Public Law 109-334, 42 Weekly Comp. Pres. Doc. 1822 (Oct. 12, 2006).

57. President Bush signs act to designate the Federal building and United States courthouse located at 2 South Main

Street in Akron, Ohio, as the "John F. Seiberling Federal Building and United States Courthouse," H.R. 6051 / Public Law 109-335, 42 Weekly Comp. Pres. Doc. 1822 (Oct. 12, 2006).

58. President Bush signs act to designate the facility of the United States Postal Service located at 101 East Gay Street in West Chester, Pennsylvania, as the "Robert J.Thompson Post Office Building," H.R. 6075 / Public Law 109-336, 42 Weekly Comp. Pres. Doc. 1822 (Oct. 12, 2006).

59. President Bush signs Rio Grande Natural Area Act, S. 56 / Public Law 109-337, 42 Weekly Comp. Pres. Doc. 1822 (Oct. 12, 2006).

60. President Bush signs National Heritage Areas Act of 2006, 42 Weekly Comp. Pres. Doc. 1815 (Oct. 12, 2006).

61. President Bush signs Rio Grand Natural Area Act of 2006, 42 Weekly Comp. Pres. Doc. 1815 (Oct. 13, 2006).

62. President Bush signs act to designate the United States courthouse at 300 North Hogan Street, Jacksonville, Florida, as the "John Milton Bryan Simpson United States Courthouse," H.R. 315 / Public Law 109-339, 42 Weekly Comp. Pres. Doc. 1864 (Oct. 13, 2006).

63. President Bush signs act to authorize the Government of Ukraine to establish a memorial on Federal land in the District of Columbia to honor the victims of the manmade famine that occurred in Ukraine in 1932-1933, H.R. 562 / Public Law 109-340, 42 Weekly Comp. Pres. Doc. 1864 (Oct. 13, 2006).

64. President Bush signs act to designate a portion of the Federal building located at 2100 Jamieson Avenue, in Alexandria, Virginia, as the "Justin W. Williams United States Attorney's Building," H.R. 1463 / Public Law 109-341, 42 Weekly Comp. Pres. Doc. 1864 (Oct. 13, 2006).

65. President Bush signs act to designate the Federal building located at 320 North Main Street in McAllen, Texas, as the "Kika de la Garza Federal Building," H.R. 2322 / Public Law 109-343, 42 Weekly Comp. Pres. Doc. 1864 (Oct. 13, 2006).

66. President Bush signs Darfur Peace and Accountability Act of 2006, H.R. 3127 / Public Law 109-344, 42 Weekly Comp. Pres Doc. 1864 (Oct. 13, 2006).

67. President Bush signs act to designate the facility of the United States Postal Service located at 777 Corporation Street in Beaver, Pennsylvania, as the "Robert Linn Memorial Post Office Building," H.R. 4768 / Public Law 109-345, 42 Weekly Comp. Pres. Doc. 1864 (Oct. 13, 2006).

68. President Bush signs act to designate the facility of the United States Postal Service located at 105 North Quincy Street in Clinton, Illinois, as the "Gene Vance Post Office Building," H.R. 4805 / Public Law 109-346, 42 Weekly Comp. Pres. Doc. 1864 (Oct. 13, 2006).

69. President Bush signs Security and Accountability for Every Port Act of 2006, H.R. 4954 / Public Law 109-347, 42 Weekly Comp. Pres. Doc. 1864 (Oct. 13, 2006).

70. President Bush signs act to designate the Investigations Building of the Food and Drug Administration located at 466 Fernandez Juncos Avenue in San Juan, Puerto Rico, as the "Andres Toro Building," H.R. 5026 / Public Law 109-348, 42 Weekly Comp. Pres. Doc. 1864 (Oct. 13, 2006).

71. President Bush signs act to designate the facility of the United States Postal Service located at 202 East Washington Street in Morris, Illinois, as the "Joshua A. Terando Morris Post Office Building," H.R. 5428 / Public Law 109-349, 42 Weekly Comp. Pres. Doc. 1864 (Oct. 13, 2006).

72. President Bush signs act to designate the facility of the United States Postal Service located at 40 South Walnut Street

in Chillicothe, Ohio, as the "Larry Cox Post Office," H.R. 5434 / Public Law 109-350, 42 Weekly Comp. Pres. Doc. 1864 (Oct. 13, 2006).

73. President Bush signs Financial Services Regulatory Relief Act of 2006, S. 2856 / Public Law109-351, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 13, 2006).

74. President Bush signs Wright Amendment Reform Act of 2006, S. 3661 / Public Law 109-352, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 13, 2006).

75. President Bush signs North Korea Nonproliferation Act of 2006, S. 3728 / Public Law 109-353, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 13, 2006).

76. President Bush signs act to revise the boundaries of John H. Chafee Coastal Barrier Resources System Jekyll Island Unit GA-06P, H.R. 138 / Public Law 109-354, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 16, 2006).

77. President Bush signs act to replace a Coastal Barrier Resources System map relating to Coastal Barrier Resources System Grayton Beach Unit FL-95P in Walton County, Florida, H.R. 479 / Public Law 109-355, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 16, 2006).

78. President Bush signs 2005 District of Columbia Omnibus Authorization Act, H.R. 3508 / Public Law 109-356, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 16, 2006).

79. President Bush signs Byron Nelson Congressional Gold Medal Act, H.R. 4902 / Public Law 109-357, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 16, 2006).

80. President Bush signs Lake Mattamuskeet Lodge Preservation Act, H.R. 5094 / Public Law 109-358, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 16, 2006).

81. President Bush signs Long Island Sound Stewardship Act of 2006, H.R. 5160 / Public Law 109-359, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 16, 2006).

82. President Bush signs National Fish Hatchery System Volunteer Act of 2006, H.R. 5381 / Public Law 109-360, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 16, 2006).

83. President Bush signs Veterans' Compensation Cost-of-Living Adjustment Act of 2006, S. 2562 / Public Law 109-361, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 16, 2006).

84. President Bush signs Northern California Coastal Wild Heritage Wilderness Act, H.R. 233 / Public Law 109-362, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 17, 2006).

85. President Bush signs act to direct the Secretary of the Interior to convey the Tylersville division of the Lamar National Fish Hatchery and Fish Technology Center to the State of Pennsylvania, and for other purposes, H.R. 4957 / Public Law 109-363, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 17, 2006).

86. President Bush signs John Warner National Defense Authorization Act for Fiscal Year 2007, H.R. 5122 / Public Law 109-364, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 17, 2006).

87. President Bush signs Older Americans Act Amendments of 2006, H.R. 6197 / Public Law 109-365, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 17, 2006).

88. President Bush signs Military Commissions Act of 2006, S. 3930 / Public Law 109-366, 42 Weekly Comp. Pres. Doc. 1865 (Oct. 17, 2006).

89. President Bush signs SAFE Port Act of 2006, 42 Weekly Comp. Pres. Doc. 1817 (Oct. 13, 2006).

90. President Bush signs the Northern California Costal Wild Heritage Wilderness Act of 2006, 42 Weekly Comp. Pres. Doc. 1836 (Oct. 17, 2006).

91. President Bush signs Secure Fence Act of 2006, 42 Weekly Comp. Pres. Doc. 1906 (Oct. 26, 2006).

Announced Intentions to Nominate (29) or Designate (1)

1. The President announced his intention to nominate Frank Baxter to be Ambassador to Uruguay, 42 Weekly Comp. Pres. Doc. 1621 (Sept. 12, 2006).

2. The President announced his intention to nominate Michele Davis to be Assistant Secretary of the Treasury (Public Affairs), 42 Weekly Comp. Pres. Doc. 1621 (Sept. 14, 2006).

3. The President announced his intention to nominate Caroline C. Hunter to be Commissioner of the Election Assistance Commission, 42 Weekly Comp. Pres. Doc. 1621 (Sept. 14, 2006).

4. The President announced his intention to nominate David Palmer to be a Commissioner of the Equal Employment Opportunity Commission, 42 Weekly Comp. Pres. Doc. 1621 (Sept. 14, 2006).

5. The President announced his intention to nominate Michael J. Astrue to be Commissioner of Social Security, 42 Weekly Comp. Pres. Doc. 1621 (Sept. 14, 2006).

6. The President announced his intention to nominate Ned L. Siegel, Norman B. Coleman, and Barbara Boxer to be U.S. Representatives to the 61st Session of the United Nations General Assembly, 42 Weekly Comp. Pres. Doc. 1621 (Sept. 14, 2006).

7. The President announced his intention to nominate Barbara McConnell Barrett and Cecil E. Floyd to be Alternate U.S. Representatives to the 61st Session of the United Nations General Assembly, 42 Weekly Comp. Pres. Doc. 1621 (Sept. 14, 2006).

8. The President announced his intention to nominate Mark J. Warshawsky and Dana K. Bilyeu to be members of the Social Security Advisory Board, 42 Weekly Comp. Pres. Doc. 1659 (Sept. 19, 2006).

9. The President announced his intention to nominate the following individuals to be members of the Board of Directors of the Inter-American Foundation: Kay Kelley Arnold (Public Representative); Gary C. Bryner (Public Representative); Thomas Joseph Dodd (Public Representative); Hector E. Morales (Government Representative); John P. Salazar (Public Representative); Thomas A. Shannon, Jr., (Government Representative); and Jack Vaughn (Public Representative), 42 Weekly Comp. Pres. Doc. 1659 (Sept. 19, 2006).

10. The President announced his intention to nominate Curtis S. Chin to be U.S. Director of the Asian Development Bank with the rank of Ambassador, 42 Weekly Comp. Pres. Doc. 1659 (Sept. 21, 2006).

11. The President announced his intention to nominate Steven R. Chealander to be a member of the National Transportation Safety Board (Qualified), 42 Weekly Comp. Pres. Doc. 1659 (Sept. 21, 2006).

12. The President announced his intention to nominate Ronald Spogli to be Ambassador to San Marino, 42 Weekly Comp. Pres. Doc. 1659 (Sept. 21, 2006).

13. The President announced his intention to nominate Craig Stapleton to be Ambassador to Monaco, 42 Weekly Comp. Pres. Doc. 1659 (Sept. 21, 2006).

14. The President announced his intention to designate Paul J. Hutter as Acting General Counsel of the Department of Veterans Affairs, 42 Weekly Comp. Pres. Doc. 1659 (Sept. 21, 2006).

15. The President announced his intention to nominate Kevin M. Kolevar to be Assistant Secretary of Energy (Electricity Delivery and Energy (Reliability), 42 Weekly Comp. Pres. Doc. 1698 (Sept. 26, 2006).

16. The President announced his intention to nominate Jane C. Luxton to be Assistant Secretary of Commerce for Oceans

and Atmosphere, 42 Weekly Comp. Pres. Doc. 1698 (Sept. 26, 2006).

17. The President announced his intention to nominate Phillip L. Swagel to be Assistant Secretary of the Treasury (Economic Policy), 42 Weekly Comp. Pres. Doc. 1698 (Sept. 26, 2006).

18. The President announced his intention to nominate Thurgood Marshall, Jr., to be a Governor of the Board of Governors of the U.S. Postal Service, 42 Weekly Comp. Pres. Doc. 1698 (Sept. 26, 2006).

19. The President announced his intention to nominate Dana Gioia to be Chairperson of the National Endowment for the Arts, 42 Weekly Comp. Pres. Doc. 1699 (Sept. 28, 2006).

20. The President announced his intention to nominate Eric D. Eberhardto be a member of the Board of Trustees of the Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, 42 Weekly Comp. Pres. Doc. 1699 (Sept. 28, 2006).

21. The President announced his intention to nominate Robert F. Hoyt to be General Counsel for the Department of the Treasury, 42 Weekly Comp. Pres. Doc. 1699 (Sept. 29, 2006).

22. The President announced his intention to nominate Charles E. Dorkey, III, to be a member of the Advisory Board of the Saint Lawrence Seaway

Development Corporation, 42 Weekly Comp. Pres. Doc. 1761 (Oct. 5, 2006).23. The President announced his intention to nominate Katherine Almquist to be Assistant Administrator of the U.S. Agency for International Development (Bureau of Africa), 42 Weekly Comp. Pres. Doc. 1863 (Oct. 19, 2006).

24. The President announced his intention to nominate Dan Gregory Blair to be a member of the Postal Rate Commission

and, upon confirmation, to designate him as Chairman, 42 Weekly Comp. Pres. Doc. 1974 (Nov. 2, 2006).

25. The President announced his intention to nominate Scott A. Keller to be Assistant Secretary of Housing and Urban Development (Congressional and Intergovernmental Relations), 42 Weekly Comp. Pres. Doc. 1974 (Nov. 2, 2006).

26. The President announced his intention to nominate Paul A. Schneider to be Under Secretary for Management at the Department of Homeland Security, 42 Weekly Comp. Pres. Doc. 1974 (Nov. 2, 2006).

27. The President announced his intention to nominate the following individuals to be members of the National Council on the Arts: Benjamin Donenberg; Foreststorn Hamilton; Joan Israelite; Charlotte P. Kessler; Robert Bretley Lott; and William Francis Price, Jr., 42 Weekly Comp. Pres. Doc. 1974 (Nov. 2, 2006).

28. The President announced his intention to nominate Anthony W. Ryan to be Assistant Secretary of the Treasury (Financial Markets), 42 Weekly Comp. Pres. Doc. 2039 (Nov. 6, 2006).

29. The President announced his intention to nominate Leon R. Sequeira to be Assistant Secretary of Labor (Policy), 42 Weekly Comp. Pres. Doc. 2039 (Nov. 6, 2006).

Nominations Submitted To (31) or Withdrawn From (3) the Senate

Submitted September 13, 42 Weekly Comp. Pres. Doc. 1622 (Sept. 13, 2006).

1. Frank Baxter, of California, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Oriental Republic of Uruguay.

2. Thomas M. Hardiman, of Pennsylvania, to be U.S. Circuit Judge for the Third Circuit.

Submitted September 15, 42 Weekly Comp. Pres. Doc. 1622 (Sept. 15, 2006).

1. Michael J. Astrue, of Massachusetts, to be Commissioner of Social Security for a term expiring January 19, 2013.

2. Caroline C. Hunter, of Florida, to be a member of the Election Assistance Commission for a term expiring December 12, 2009.

3. David Palmer, of Maryland, to be a member of the Equal Employment Opportunity Commission for a term expiring July 1, 2011.

Submitted September 20, 42 Weekly Comp. Pres. Doc. 1660 (Sept. 20, 2006).

1. Kay Kelley Arnold, of Arkansas, to be a member of the Board of Directors of the Inter-American Foundation for a term expiring October 6, 2010 (reappointment).

2. Dana K. Bilyeu, of Nevada, to be a member of the Social Security Advisory Board for a term expiring September 30, 2010.

3. Barbara Boxer, of California, to be a Representative of the United States of America to the Sixty-first Session of the General Assembly of the United Nations.

4. Gary C. Bryner, of Utah, to be a member of the Board of Directors of the Inter-American Foundation for a term expiring June 26, 2008.

5. Norman B. Coleman, of Minnesota, to be a Representative of the United States of America to the Sixty-first Session of the General Assembly of the United Nations.

6. Thomas Joseph Dodd, of the District of Columbia, to be a member of the Board of Directors of the Inter-American Foundation for a term expiring June 26, 2008.

7. Cecil E. Floyd, of South Carolina, to be an Alternate Representative of the United States of America to the Sixty-first Session of the General Assembly of the United Nations.

8. Hector E. Morales, of Texas, to be a member of the Board of Directors of the Inter-American Foundation for a term expiring September 20, 2010.

9. John P. Salazar, of New Mexico, to be a member of the Board of Directors of the Inter-American Foundation for a term expiring September 20, 2012.

10. Thomas A. Shannon, Jr., of Virginia, a career member of the Senior Foreign Service, class of Minister-Counselor, to be a member of the Board of Directors of the Inter-American Foundation for a term expiring September 20, 2012.

11. Jack Vaughn, of Texas, to be a member of the Board of Directors of the Inter-American Foundation for a term expiring September 20, 2012 (reappointment).

12. Mark J. Warshawsky, of Maryland, to be a member of the Social Security Advisory Board for a term expiring September 30, 2012.

Withdrawn September 20, 42 Weekly Comp. Pres. Doc. 1661 (Sept. 20, 2006).

1. Nadine Hogan, of Florida, to be a member of the Board of Directors of the Inter-American Foundation for a term expiring June 26, 2008.

2. Nadine Hogan, of Florida, to be a member of the Board of Directors of the Inter-American Foundation for a term expiring June 26, 2008 (reappointment).

3. John E. Maupin, Jr., of Tennessee, to be a member of the Social Security Advisory Board for a term expiring September 30, 2010.

Submitted September 21, 42 Weekly Comp. Pres. Doc. 1661 (Sept. 21, 2006).

1. Steven R. Chealander, of Texas, to be a member of the National Transportation Safety Board for the remainder of the term expiring December 31, 2007.

2. Curtis S. Chin, of New York, to be U.S. Director of the Asian Development Bank, with the rank of Ambassador.

3. Ronald Spogli, of California, to serve concurrently and without additional compensation as Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of San Marino.

4. Craig Roberts Stapleton, of Connecticut, to serve concurrently and without additional compensation as Ambassador Extraordinary and Plenipotentiary of the United States of America to Monaco.

Submitted September 26, 42 Weekly Comp. Pres. Doc. 1699 (Sept. 26, 2006).

1. Kevin M. Kolevar, of Michigan, to be an Assistant Secretary of Energy (Electricity Delivery and Energy Reliability).

2. Jane C. Luxton, of Virginia, to be Assistant Secretary of Commerce for Oceans and Atmosphere.

3. Thurgood Marshall, Jr., of Virginia, to be a Governor of the U.S. Postal Service for a term expiring December 8, 2011.

4. Phillip L. Swagel, of Maryland, to be an Assistant Secretary of the Treasury.

Submitted September 28, 42 Weekly Comp. Pres. Doc. 1700 (Sept. 28, 2006).

1. Michele A. Davis, of Virginia, to be an Assistant Secretary of the Treasury.

2. Eric D. Eberhard, of Washington, to be a member of the Board of Trustees of the Morris K. Udall Scholarship and Excellence in National Environmental Policy, Foundation for a term expiring October 6, 2012.

3. Dana Gioia, of California, to be Chairperson of the National Endowment for the Arts for a term of 4 years (reappointment).

Submitted September 29, 42 Weekly Comp. Pres. Doc. 1700 (Sept. 29, 2006).

1. John Roberts Hackman, of Virginia, to be U.S. Marshal for the Eastern District of Virginia for the term of 4 years.

2. Robert F. Hoyt, of Maryland, to be General Counsel for the Department of the Treasury.

3. William Lindsay Osteen, Jr., of North Carolina, to be U.S. District Judge for the Middle District of North Carolina.

4. Martin Karl Reidinger, of North Carolina, to be U.S. District Judge for the Western District of North Carolina.

5. Thomas D. Schroeder, of North Carolina, to be U.S. District Judge for the Middle District of North Carolina.

Recess Appointments (2)

1. President Bush recess appointed Richard E. Stickler of West Virginia to be Assistant Secretary of Mine Safety at the Department of Labor, 42 Weekly Comp. Pres. Doc. 1863 (Oct. 19, 2006).

2. The President Bush recess appointed Jeffrey R. Brown of Illinois to be Member of the Social Security Advisory Board, 42 Weekly Comp. Pres. Doc. 1863 (Oct. 19, 2006).

Announced Intention to Appoint Non-principal Officers (25)

1. The President announced his intention to appoint Joseph B. Gildenhorn and Susan Hutchison as members of the Board of Trustees of the Woodrow Wilson International Center for Scholars, 42 Weekly Comp. Pres. Doc. 1621 (Sept. 12, 2006).

2. The President announced his intention to appoint Frank D. Stella as a member of the Board of Governors of the United

Service Organizations, Inc., 42 Weekly Comp. Pres. Doc. 1622 (Sept. 14, 2006).

3. The President announced his intention to appoint Duane R. Roberts, Jean Kennedy Smith, and Wilma E. Bernstein as members of the Board of Trustees of the John F. Kennedy Center for the Performing Arts, 42 Weekly Comp. Pres. Doc. 1622 (Sept. 14, 2006).

4. The President announced that he has named Jeremy Katz and Myriah Jordan as Special Assistants to the President for Policy, 42 Weekly Comp. Pres. Doc. 1622 (Sept. 14, 2006).

5. The President announced his designation of the following individuals as members of a Presidential delegation to Ukraine to attend the commemoration of the 65th anniverary of the tragedy in Babyn Yar on September 27: Margaret Spellings (head of delegation); William B. Taylor, Jr.; Gregg Rickman; Fred S. Zeidman; and Vincent Obsitnik, 42 Weekly Comp. Pres. Doc. 1659 (Sept. 18, 2006).

6. The President announced his intention to designate Sylvester J. Schieber as Chairman of the Social Security Advisory Board, 42 Weekly Comp. Pres. Doc. 1659 (Sept. 19, 2006).

7. The President announced his intention to designate Jack Vaughn as Vice Chairman of the Board of Directors of the Inter-American Foundation, 42 Weekly Comp. Pres. Doc. 1659 (Sept. 19, 2006).

8. The President announced his designation of the following individuals as members of a delegation to Beirut, Lebanon, to visit areas affected by recent conflict and to meet with Prime Minister Fuad Siniora of Lebanon and business leaders to discuss rebuilding priorities: Dina Powell (head of delegation); Jeffrey Feltman; John T. Chambers; Yousif Ghafari; and Ray Irani, 42 Weekly Comp. Pres. Doc. 1698 (Sept. 23, 2006).

9. The President announced his designation of the following individuals as members of a Presidential delegation to Budapest, Hungary, to attend the 50th anniversary of the Hungarian Revolution on October 23: George E. Pataki (head of delegation); April H. Foley; Peter K. Gogolak; and Steven F. Udvar-Hazy, 42 Weekly Comp. Pres. Doc. 1698 (Sept. 25, 2006).

10. The President announced that he has named Tony Fratto as Deputy Assistant to the President and Deputy Press Secretary, 42 Weekly Comp. Pres. Doc. 1698 (Sept. 26, 2006).

11. The President announced his intention to appoint the following individuals as members of the Advisory Commission on Drug-Free Communities: Catherine Thatcher Brunson (Public); Dennis Griffith (National Substance Abuse Reduction Organization); Steve Moak (National Substance Abuse Reduction Organization); and Janet R. Wood (State Substance Abuse Reduction Organization), 42 Weekly Comp. Pres. Doc. 1699 (Sept. 28, 2006).

12. The President announced his intention to appoint Mary E. Peters as a member of the Amtrak Reform Board, 42 Weekly Comp. Pres. Doc. 1760 (Oct. 2, 2006).

13. The President announced his intention to designate Stanley E. Taylor as Chairman of the Commission on Presidential Scholars, 42 Weekly Comp. Pres. Doc. 1761 (Oct. 5, 2006).

14. The President announced his intention to appoint Mark B. Murphy as a member of the Advisory Board of the National Air and Space Museum, 42 Weekly Comp. Pres. Doc. 1761 (Oct. 5, 2006).

15. The President announced his intention to appoint Debra Lynn Crisp as a member of the Klamath River Compact Commission (Federal Representative) and, upon appointment,

to designate her as Chairman, 42 Weekly Comp. Pres. Doc. 1761 (Oct. 5, 2006).

16. The President announced his intention to appoint Steven M. Colloton as a member of the Board of Trustees of the James Madison Memorial Fellowship Foundation (Federal Judiciary), 42 Weekly Comp. Pres. Doc. 1761 (Oct. 5, 2006).

17. The President announced that he has named David Broome as Special Assistant to the President for Legislative Affairs, 42 Weekly Comp. Pres. Doc. 1819 (Oct. 12, 2006).

18. The President announced that he has named Gordon Johndroe as Special Assistant to the President and National Security Council Press Secretary, 42 Weekly Comp. Pres. Doc. 1819 (Oct. 12, 2006).

19. The President announced that he has named Richard Klingler as Senior Associate Counsel to the President and National Security Council Legal Advisor and General Counsel, 42 Weekly Comp. Pres. Doc. 1819 (Oct. 12, 2006).

20. The President announced that he has named Bobby Pittman, Jr., as Special Assistant to the President for African Affairs of the National Security Council, 42 Weekly Comp. Pres. Doc. 1819 (Oct. 12, 2006).

21. The President announced his intention to appoint the following individuals as members of the Board of Trustees of the John F. Kennedy Center for the Performing Arts: Elliott Bryan Broidy; Emilio Estefan, Jr.; Sheldon B. Kamins; James V. Kimsey; Norman Y. Mineta; and Stephen A.Wynn, 42 Weekly Comp. Pres. Doc. 1973 (Oct. 30, 2006).

22. The President announced his designation of the following individuals as members of the Presidential delegation to observe the Presidential and legislative elections in Managua, Nicaragua, on November 5: Paul Trivelli; J. Bennett Johnston; and Bill Paxon, 42 Weekly Comp. Pres. Doc. 1974 (Nov. 2, 2006).

23. The President announced his intention to appoint Juan Carlos Iturregui and Leonard Sands as members of the President's Export Council, 42 Weekly Comp. Pres. Doc. 1974 (Nov. 2, 2006).

24. The President announced that he has named Craig M. Albright as Special Assistant to the President for Legislative Affairs, 42 Weekly Comp. Pres. Doc. 1974 (Nov. 3, 2006).

25. The President announced that he has named Ross Kyle as Special Assistant to the President for Cabinet Liaison, 42 Weekly Comp. Pres. Doc. 1974 (Nov. 3, 2006).

Resignations/Retirements (1)

1. Statement on the Retirement of Chief Usher Gary Walters, 42 Weekly Comp. Pres. Doc. 1877 (Oct. 27, 2006).

Declared Federal Emergencies or Major Disasters (10)

1. The President declared a major disaster in Arizona and ordered Federal aid to supplement State and local recovery efforts in the area struck by severe storms and flooding from July 25 to August 4, 42 Weekly Comp. Pres. Doc. 1591 (Sept. 7, 2006).

2. The President declared a major disaster in Virginia and ordered Federal aid to supplement Commonwealth and local recovery efforts in the area struck by severe storms and flooding, including severe storms and flooding associated with Tropical Depression Ernesto, from August 29 to September 7, 42 Weekly Comp. Pres. Doc. 1660 (Sept. 22, 2006).

3. The President declared a major disaster in Indiana and ordered Federal aid to supplement State and local recovery efforts in the area struck by severe storms and flooding from September 12-14, 42 Weekly Comp. Pres. Doc. 1761 (Oct. 6, 2006).

4. The President declared an emergency in New York and ordered Federal aid to supplement State and local response

efforts in the area struck by a lake-effect snowstorm on October 12 and continuing, 42 Weekly Comp. Pres. Doc. 1862 (Oct 15, 2006).

5. The President declared a major disaster in Alaska and ordered Federal aid to supplement State and local recovery efforts in the area struck by severe storms, flooding, landslides, and mudslides on August 15-25, 42 Weekly Comp. Pres. Doc. 1862 (Oct. 16, 2006).

6. The President declared a major disaster in Hawaii and ordered Federal aid to supplement State and local recovery efforts in the area struck by an earthquake on October 15 and related aftershocks, 42 Weekly Comp. Pres. Doc. 1862 (Oct. 17, 2006).

7. The President declared a major disaster in New York and ordered Federal aid to supplement State and local recovery efforts in the area struck by severe storms and flooding on October 12-13 and continuing, 42 Weekly Comp. Pres. Doc. 1905 (Oct. 24, 2006).

8. The President declared a major disaster in Alaska and ordered Federal aid to supplement State and local recovery efforts in the area struck by a fire from August 3-4, 42 Weekly Comp. Pres. Doc. 1906 (Oct. 27, 2006).

9. The President declared a major disaster in Missouri and ordered Federal aid to supplement State and local recovery efforts in the area struck by severe storms on July 19-21, 42 Weekly Comp. Pres. Doc. 1974 (Nov. 2, 2006).

10. The President declared a major disaster in Louisiana and ordered Federal aid to supplement State and local recovery efforts in the area struck by severe storms and flooding on October 16 and continuing, 42 Weekly Comp. Pres. Doc. 1974 (Nov. 2, 2006).

Communications to Congress (17)

1. Letter to the Speaker of the House of Representatives Transmitting Budget Amendments for the Federal Coordinator for Gulf Coast Rebuilding Office, 42 Weekly Pres. Doc. 1641 (Sept. 20, 2006).

2. Message to Congress on Continuation of the National Emergency With Respect to Persons Who Commit, Threaten To Commit, or Support Terrorism, 42 Weekly Comp. Pres. Doc. 1653 (Sept. 21, 2006).

3. Message to the Senate Transmitting the United States-European Union Agreement on Extradition, 42 Weekly Comp. Pres. Doc. 1678 (Sept. 27, 2006).

4. Message to the Senate Transmitting the United States-European Union Agreement on Mutual Legal Assistance, 42 Weekly Comp. Pres. Doc. 1677 (Sept. 27, 2006).

5. Message to the Senate Transmitting the Protocol Amending the Denmark-United States Taxation Convention, 42 Weekly Comp. Pres. Doc. 1709 (Sept. 29, 2006)

6. Message to the Congress Transmitting the District of Columbia's Fiscal Year 2007 Budget Request, 42 Weekly Comp. Pres. Doc. 1706 (Sept. 29, 2006)

7. Message to the Senate Transmitting the Estonia-United States Extradition Treaty, 42 Weekly Comp. Pres. Doc. 1710 (Sept. 29, 2006)

8. Message to the Senate Transmitting the Protocol Amending the Finland-United States Taxation Convention, 42 Weekly Comp. Pres. Doc. 1709 (Sept. 29, 2006)

9. Message to the Senate Transmitting the Protocol Amending the Germany-United States Taxation Convention, 42 Weekly Comp. Pres. Doc. 1710 (Sept. 29, 2006)

10. Message to the Senate Transmitting the Latvia-United States Extradition Treaty, 42 Weekly Comp. Pres. Doc. 1711 (Sept. 29, 2006)

11. Message to the Senate Transmitting the Malta-United States Extradition Treaty, 42 Weekly Comp. Pres. Doc. 1711 (Sept. 29, 2006)

12. Letter to Congressional Leaders on Blocking Property of and Prohibiting Transactions With the Government of Sudan, 42 Weekly Comp. Pres. Doc. 1826 (Oct. 13, 2006).

13. Letter to Congressional Leaders on Continuation of the National Emergency With Respect to Significant Narcotics Traffickers Centered in Colombia, 42 Weekly Comp. Pres. Doc. 1855 (Oct. 19, 2006).

14. Letter to Congressional Leaders Reporting on Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of the Congo, 42 Weekly Comp. Pres. Doc. 1935 (Oct. 27, 2006).

15. Letter to Congressional Leaders on Continuation of the National Emergency Regarding the Proliferation of Weapons of Mass Destruction, 42 Weekly Comp. Pres. Doc. 1907 (Oct. 27, 2006).

16. Notice to the Speaker of the House of Representatives and President of the Senate of Continued National Emergency Regarding the Proliferation of Weapons of Mass Destruction, 42 Weekly Comp. Pres. Doc. 1917 (Oct. 27, 2006).

17. Continuation of National Emergency With Respect to Sudan, 42 Weekly Comp. Pres. Doc. 1945 (Nov. 1, 2006).

Communications to Federal Agencies (12)

1. Memorandum on the 2006 Combined Federal Campaign, 42 Weekly Comp. Pres. Doc. 1601 (Sept. 13, 2006).

2. Memorandum on Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 42 Weekly Comp. Pres. Doc. 1601 (Sept. 13, 2006).

3. Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2007

(Memorandum for the Secretary of State), 42 Weekly Comp. Pres. Doc. 1627 (Sept. 15, 2006).

4. Memorandum to the Secretary of State on Presidential Determination With Respect to Foreign Governments' Efforts Regarding Trafficking in Persons, 42 Weekly Comp. Pres. Doc. 1675 (Sept. 26, 2006).

5. Memorandum for the Heads of Executive Departments and Agencies on the Extension of the Safety, Health, and Return-to-Employment (SHARE) Initiative, 42 Weekly Comp. Pres. Doc. 1705 (Sept. 29, 2006)

6. Memorandum for the Secretary of State and the Secretary of Defense re: Presidential Determination on Drawdown of Commodities and Services From the Department of Defense To Support Transport of Indonesian Peacekeeping Forces to Lebanon, 42 Weekly Comp. Pres. Doc. 1708 (Sept. 29, 2006)

7. Memorandum for the Secretary of State on Waiving Prohibition on United States Military Assistance With Respect to Various Parties to the Rome Statute Establishing the International Criminal Court, 42 Weekly Comp. Pres. Doc. 1708 (Sept. 29, 2006)

8. Memorandum for the Secretary of State and the Secretary of Commerce on Promoting Sustainable Fisheries and Ending Destructive Fishing Practices, 42 Weekly Comp. Pres. Doc. 1718 (Oct. 2, 2006)

9. Memorandum for the Secretary of State: Presidential Determination on FY 2007 Refugee Admissions Numbers and Authorizations of In-Country Refugee Status, 42 Weekly Comp. Pres. Doc. 1801 (Oct. 11, 2006).

10. Memorandum for the Secretary of State Regarding Waiver and Certification of Statutory Provision Regarding the Palestinian Liberation Organization Office, 42 Weekly Comp. Pres. Doc. 1818 (Oct. 13, 2006).

11. Memorandum to the Secretaries of Defense and State on the Provision of United States Drug Interdiction Assistance to the Government of Brazil, 42 Weekly Comp. Pres. Doc. 1830 (Oct. 16, 2006).

12. Memorandum to U.S. Trade Rep. on Determinations Under Sec. 1106(a) of the Omnibus Trade and Competitiveness Act of 1988—Socialist Republic of Vietnam, 42 Weekly Comp. Pres. Doc. 2022 (Nov. 6, 2006).

Statements (31)

1. Statement on the Visit of Prime Minister Tony Blair of the United Kingdom to the Middle East, 42 Weekly Comp. Pres. Doc. 1597 (Sept. 9, 2006).

2. Statement on the House of Representatives Action on the "Federal Funding Accountability and Transportation Act of 2006," 42 Weekly Comp. Pres. Doc. 1601 (Sept. 13, 2006).

3. Statement on House of Representative Action on Reform Earmarking Rules, 42 Weekly Comp. Pres. Doc. 1605 (Sept. 14, 2006).

4. Statement on Senate Action on the "Port Security Improvement Act of 2006," 42 Weekly Comp. Pres. Doc. 1605 (Sept. 14, 2006).

5. Statement on the Death of Ann Richards, 42 Weekly Comp. Pres. Doc. 1605 (Sept. 14, 2006).

6. Statement on Senate Action on the United States-Oman Free Trade Agreement, 42 Weekly Comp. Pres. Doc. 1639 (Sept. 19, 2006).

7. Statement on Senate Confirmation of Alice S. Fisher To Be Assistant Attorney General for the Criminal Division at the Department of Justice, 42 Weekly Comp. Pres. Doc. 1639 (Sept. 19, 2006).

8. Statement on the Creation of the United States-China Strategic Economic Dialogue, 42 Weekly Comp. Pres. Doc. 1640 (Sept. 20, 2006).

9. Remarks on Senate Action on the "Military Commissions Act of 2006" in Orlando, Florida, 42 Weekly Comp. Pres. Doc. 1646 (Sept. 21, 2006).

10. Message on the Observance of Rosh Hashanah, 5767, 42 Weekly Comp. Pres. Doc. 1651 (Sept. 21, 2006).

11. Statement on Senate Confirmation of Kenneth Wainstein To Be Assistant Attorney General for National Security at the Department of Justice, 42 Weekly Comp. Pres. Doc. 1658 (Sept. 22, 2006).

12. Statement on the Report of the Commission on the Future of Higher Education, 42 Weekly Comp. Pres. Doc. 1674 (Sept. 26, 2006).

13. Statement on the Death of Byron Nelson, 42 Weekly Comp. Pres. Doc. 1674 (Sept. 26, 2006).

14. Statement on House of Representatives Action on the "Military Commissions Act of 2006," 42 Weekly Comp. Pres. Doc. 1676 (Sept. 27, 2006).

15. Statement on Senate Action on the "Military Commissions Act of 2006," 42 Weekly Comp. Pres. Doc. 1687 (Sept. 28, 2006).

16. Statement on Congressional Action on the "Department of Defense Appropriations Act, 2007," 42 Weekly Comp. Pres. Doc. 1698 (Sept. 29, 2006).

17. Statement on Signing the Department of Defense Appropriations Act, 2007, 42 Weekly Comp. Pres. Doc. 1703 (Sept. 29, 2006).

18. Statement on Congressional Action on the "Iran Freedom Support Act," 42 Weekly Comp. Pres. Doc. 1707 (Sept. 30, 2006).

19. Statement on Senate Confirmation of Mary Peters To Be Secretary of Transportation, 42 Weekly Comp. Pres. Doc. 1707 (Sept. 30, 2006).

20. Statement on Signing the Department of Homeland Security Appropriations Act, 2007, 42 Weekly Comp. Pres. Doc. 1742 (Oct. 4, 2006).

21. Statement on Signing the National Heritage Areas Act of 2006, 42 Weekly Comp. Pres. Doc. 1815 (Oct. 12, 2006).

22. Statement on Signing the Rio Grande Natural Area Act, 42 Weekly Comp. Pres. Doc. 1815 (Oct. 12, 2006).

23. Statement on Signing the SAFE Port Act, 42 Weekly Comp. Pres. Doc. 1817 (Oct. 13, 2006).

24. Statement: President Declares Certain Areas of New York Qualify for Federal Disaster Relief Assistance (Oct. 15, 2006).

25. Statement: President Declares Certain Areas of Alaska Qualify for Federal Disaster Relief Assistance (Oct. 16, 2006).

26. Statement on Signing the John Warner National Defense Authorization Act for Fiscal Year 2007, 42 Weekly Comp. Pres. Doc. 1836 (Oct. 17, 2006).

27. Statement on Signing the Northern California Coastal Wild Heritage Wilderness Act, 42 Weekly Comp. Pres. Doc. 1836 (Oct. 17, 2006).

28. Statement: President Declares Certain Areas of Hawaii Qualify for Federal Disaster Relief Assistance (Oct. 17, 2006).

29. Statement on the Population of the United States Reaching 300 Million, 42 Weekly Comp. Pres. Doc. 1837 (Oct. 17, 2006).

30. Statement: President Declares Certain Parishes in Louisiana Qualify for Federal Disaster Relief Assistance, 42 Weekly Comp. Pres. Doc. 1974 (Nov. 2, 2006).

31. Statement: President Declares Certain Areas of Missouri Qualify for Federal Disaster Relief Assistance, 42 Weekly Comp. Pres. Doc. 1974 (Nov. 2, 2006).

Meetings With Foreign Leaders (19)

1. Remarks Following Discussions With President Roh Moo-hyun of South Korea and an Exchange With Reporters, 42 Weekly Comp. Pres. Doc. 1602 (Sept. 14, 2006).
2. Remarks Following Discussions With Prime Minister Abdullah bin Ahmad Badawi of Malaysia in New York City, 42 Weekly Comp. Pres. Doc. 1632 (Sept. 18, 2006).
3. Remarks Following Discussions With President Jacques Chirac of France and an Exchange With Reporters in New York City, 42 Weekly Comp. Pres. Doc. 1632 (Sept. 19, 2006).

4. Remarks Following Discussions With President Jalal Talabani of Iraq in New York City, 42 Weekly Comp. Pres. Doc. 1638 (Sept. 19, 2006).
5. Remarks Following Discussion With President Mahmoud Abbas of the Palestinian Authority in New York City, 42 Weekly Comp. Pres. Doc. 1639 (Sept. 20, 2006).
6. The President's News Conference With President Pervez of Musharraf of Pakistan, 42 Weekly Comp. Pres. Doc. 1653 (Sept. 22, 2006).
7. The President's News Conference With President Hamid Karzai of Afghanistan, 42 Weekly Comp. Pres. Doc. 1668 (Sept. 26, 2006).
8. Remarks Prior to Discussions With President Hamid Karzai of Afghanistan and President Pervez Musharraf of Pakistan, 42 Weekly Comp. Pres. Doc. 1677 (Sept. 27, 2006).
9. Remarks Following Discussions With President Nursultan Nazarbayev of Kazakhstan, 42 Weekly Comp. Pres. Doc. 1695 (Sept. 29, 2006).
10. Joint Statement by the United States and Kazakhstan, 42 Weekly Comp. Pres. Doc. 1696 (Sept. 29, 2006).
11. Remarks Following Discussions With Prime Minister Recep Tayyip Erdogan of Turkey, 42 Weekly Comp. Pres. Doc. 1712 (Oct. 2, 2006)

12. Remarks Following a Meeting With Special Envoy for Sudan Andrew S. Natsios, 42 Weekly Comp. Pres. Doc. 1712 (Oct. 2, 2006)

13. Joint Statement by the United States of America and the Republic of Peru, 42 Weekly Comp. Pres. Doc. 1769 (Oct. 10, 2006).

14. Remarks Following Discussions With President Alan Garcia Perez of Peru, 42 Weekly Comp. Pres. Doc. 1768 (Oct. 10, 2006).

15. Remarks Following Discussions With Prime Minister Ivo Sanader of Croatia, 42 Weekly Comp. Pres. Doc. 1835 (Oct. 17, 2006).

16. Remarks Following Discussions With President Leonel Fernandez Reyna of the Dominican Republic, 42 Weekly Comp. Pres. Doc. 1890 (Oct. 25, 2006).

17. Remarks Following Discussions With Secretary General Jakob Gijsbert "Jaap" de Hoop Scheffer of the North Atlantic Treaty Organization and an Exchange With Reporters, 42 Weekly Comp. Pres. Doc. 1903 (Oct. 27, 2006).

18. Joint Statement by President George W. Bush and Prime Minister Nuri al-Maliki of Iraq, 42 Weekly Comp. Pres. Doc. 1916 (Oct. 28, 2006).

19. Remarks Following a Meeting With Special Envoy for Sudan Andrew S. Natsios, 42 Weekly Comp. Pres. Doc. 1937 (Oct. 31, 2006).

Remarks/ Radio/ Media (89)

Campaign 2006 (36)

1. Remarks to the Georgia Public Policy Foundation in Atlanta, Georgia, 42 Weekly Comp. Pres. Doc. 1576 (Sept. 7, 2006).

2. Remarks at a Reception for Congressional Candidate Max Burns in Pooler, Georgia 42 Weekly Comp. Pres. Doc. 1583 (Sept. 7, 2006).

3. Remarks to Reporters Following a Meeting With the House Republican Conference, 42 Weekly Comp. Pres. Doc. 1602 (Sept. 14, 2006).

4. Remarks at a Reception for Congressional Candidate Gus Bilirakis in Tampa, Florida, 42 Weekly Comp. Pres. Doc. 1641 (Sept. 21, 2006).

5. Remarks at a Reception for Gubernatorial Candidate Charlie Crist and the Republic Party of Florida in Orlando, 42 Weekly Comp. Pres. Doc. 1647 (Sept. 21, 2006).

6. Remarks at a Luncheon for Gubernatorial Candidate Bob Riley in Birmingham, Alabama, 42 Weekly Comp. Pres. Doc. 1680 (Sept. 28, 2006).

7. Remarks at a Reception for Congressional Candidate Dean Heller in Reno, Nevada, 42 Weekly Comp. Pres. Doc. 1713 (Oct. 2, 2006).

8. Remarks at a Breakfast for Congressional Candidate Richard W. Pombo in Stockton, California, 42 Weekly Comp. Pres. Doc. 1719 (Oct. 3, 2006).

9. Remarks at a Reception for Gubernatorial Candidate Bob Beauprez and the Colorado Republican Party in Englewood, Colorado, 42 Weekly Comp. Pres. Doc. 1743 (Oct. 4, 2006).

10. Remarks at a Breakfast for Congressional Candidate Rick Renzi in Scottsdale, Arizona, 42 Weekly Comp. Pres. Doc. 1734 (Oct. 4, 2006).

11. Remarks at a Reception for Congressional Candidate Mac Collins in Macon, Georgia, 42 Weekly Comp. Pres. Doc. 1777 (Oct. 10, 2006).

12. Remarks at a Reception for Congressional Candidates Peter Roskam and David McSweeney and the Illinois Congressional Victory Committee in Chicago, Illinois, 42 Weekly Comp. Pres. Doc. 1808 (Oct. 12, 2006).

13. Remarks at a Reception for Senatorial Candidate George Allen in Richmond, Virginia, 42 Weekly Comp. Pres. Doc. 1850 (Oct. 19, 2006).

14. Remarks at a National Republican Senatorial Committee Reception, 42 Weekly Comp. Pres. Doc. 1856 (Oct. 20, 2006).

15. Remarks at a Luncheon for Congressional Candidate Jeff Lamberti and Iowa Victory 2006 in Des Moines, Iowa, 42 Weekly Comp. Pres. Doc. 1892 (Oct. 26, 2006).

16. Remarks at a Reception for Senatorial Candidate Michael Bouchard in Warren, Michigan, 42 Weekly Comp. Pres. Doc. 1898 (Oct. 26, 2006).

17. Remarks to Reporters in Clinton Township, Michigan, 42 Weekly Comp. Pres. Doc. 1898 (Oct. 26, 2006).

18. Remarks at a Reception for Congressional Candidate Vern Buchanan in Sarasota, Florida, 42 Weekly Comp. Pres. Doc. 1871 (Oct. 27, 2006).

19. Remarks at an Indiana Victory 2006 Rally in Sellersburg, Indiana, 42 Weekly Comp. Pres. Doc. 1908 (Oct. 28, 2006).

20. Remarks at Charleston Air Force Base, South Carolina, 42 Weekly Comp. Pres. Doc. 1914 (Oct. 28, 2006).

21. Remarks at a Georgia Victory 2006 Rally in Statesboro, Georgia, 42 Weekly Comp. Pres. Doc. 1917 (Oct. 30, 2006).

22. Remarks at a Texas Victory 2006 Rally in Sugar Land, Texas, 42 Weekly Comp. Pres. Doc. 1923 (Oct. 30, 2006).

23. Remarks at a Georgia Victory 2006 Rally in Perry, Georgia, 42 Weekly Comp. Pres. Doc. 1937 (Oct. 31, 2006).

24. Remarks at a Montana Victory 2006 Rally in Billings, Montana, 42 Weekly Comp. Pres. Doc. 1945 (Nov. 2, 2006).

25. Remarks at a Nevada Victory 2006 Rally in Elko, Nevada, 42 Weekly Comp. Pres. Doc. 1952 (Nov. 2, 2006).

26. Remarks at an Iowa Victory 2006 Rally in Le Mars, Iowa, 42 Weekly Comp. Pres. Doc. 1977 (Nov. 3, 2006).
27. Remarks at at a Missouri Victory 2006 Rally in Joplin, Missouri, 42 Weekly Comp. Pres. Doc. 1966 (Nov. 3, 2006).
28. Remarks at a Missouri Victory 2006 Rally in Springfield, Missouri, 42 Weekly Comp. Pres. Doc. 1959 (Nov. 3, 2006).
29. Remarks at a Kansas Victory 2006 Rally in Topeka, Kansas, 42 Weekly Comp. Pres. Doc. 2000 (Nov. 5, 2006).
30. Remarks at a Nebraska Victory 2006 Rally in Grand Island, Nebraska, 42 Weekly Comp. Pres. Doc. 1993 (Nov. 5, 2006).
31. Remarks on Departure From Waco, Texas Regarding Former Iraqi President Hussein Trial Verdict, 42 Weekly Comp. Pres. Doc. 1992 (Nov. 5, 2006).
32. Remarks at a Perry for Governor 2006 Rally in Dallas, Texas, 42 Weekly Comp. Pres. Doc. 2017 (Nov. 6, 2006).
33. Remarks at an Arkansas Victory 2006 Rally in Bentonville, Arkansas, 42 Weekly Comp. Pres. Doc. 2011 (Nov. 6, 2006).
34. Remarks at a Colorado Victory 2006 Rally in Greeley, Colorado, 42 Weekly Comp. Pres. Doc. 1985 (Nov. 6, 2006)
35. Remarks at a Florida Victory 2006 Rally in Pensacola, Florida, 42 Weekly Comp. Pres. Doc. 2006 (Nov. 6, 2006).
36. Remarks on Election Day in Crawford, Texas, 42 Weekly Comp. Pres. Doc. 2022 (Nov. 7, 2006).

General Remarks (41)

1. Remarks Following a Tour of the Tribute WTC Visitor Center in New York City, 42 Weekly Comp. Pres. Doc. 1597 (Sept. 10, 2006).
2. Address to the Nation on the War on Terror, 42 Weekly Comp. Pres. Doc. 1597 (Sept. 11, 2006).

3. Remarks at the White House Conference on Global Literacy in New York City, 42 Weekly Comp. Pres. Doc. 1629 (Sept. 18, 2006).

4. Remarks to the United Nations General Assembly in New York City, 42 Weekly Comp. Pres. Doc. 1633 (Sept. 19, 2006).

5. Remarks at a Luncheon Hosted by Secretary-General Kofi Annan of the United Nations in New York City, 42 Weekly Comp. Pres. Doc. 1637 (Sept. 19, 2006).

6. Message on the Observance of Ramadan, 42 Weekly Comp. Pres. Doc. 1663 (Sept. 21, 2006).

7. Remarks Following a Tour of Meyer Tool, Inc., in Cincinnati, Ohio, 42 Weekly Comp. Pres. Doc. 1665 (Sept. 25, 2006).

8. Remarks Following a Meeting With Business Leaders on the U.S.-Lebanon Partnership Fund, 42 Weekly Comp. Pres. Doc. 1665 (Sept. 25, 2006).

9. Remarks on Signing the Federal Funding Accountability and Transparency Act of 2006, 42 Weekly Comp. Pres. Doc. 1666 (Sept. 26, 2006).

10. Remarks on Energy in Hoover, Alabama, 42 Weekly Comp. Pres. Doc. 1679 (Sept. 28, 2006).

11. Remarks Following a Meeting With the Republican Senate Conference, 42 Weekly Comp. Pres. Doc. 1679 (Sept. 28, 2006).

12. Message on the Observance of Yom Kippur, 5767, 42 Weekly Comp. Pres. Doc. 1687 (Sept. 28, 2006).

13. Remarks to the Reserve Officers Association, 42 Weekly Comp. Pres. Doc. 1688 (Sept. 29, 2006).

14. Remarks on Arrival in Los Angeles, California, 42 Weekly Comp. Pres. Doc. 1731 (Oct. 3, 2006).

15. Remarks on Signing the Department of Homeland Security Appropriations Act for Fiscal Year 2007 in Scottsdale, 42 Weekly Comp. Pres. Doc. 1740 (Oct. 4, 2006).

16. Remarks at George W. Bush Elementary School in Stockton, California, 42 Weekly Comp. Pres. Doc. 1725 (Oct. 3, 2006).

17. Remarks at a Reception Celebrating Hispanic Heritage Month, 42 Weekly Comp. Pres. Doc. 1758 (Oct. 6, 2006).

18. Remarks at the [U.S.] Department of Education, 42 Weekly Comp. Pres. Doc. 1749 (Oct. 5, 2006).

19. Remarks at Woodridge Elementary and Middle Campus, 42 Weekly Comp. Pres. Doc. 1750 (Oct. 5, 2006).

20. Remarks on the National Economy, 42 Weekly Comp. Pres. Doc. 1757 (Oct. 6, 2006).

21. Remarks at a Christening Ceremony for the USS George H .W. Bush in Newport News, Virginia, 42 Weekly Comp. Pres. Doc. 1766 (Oct. 7, 2006).

22. Remarks on the Situation in North Korea, 42 Weekly Comp. Pres. Doc. 1767 (Oct. 9, 2006).

23. Remarks in a Discussion on School Safety in Chevy Chase, Maryland, 42 Weekly Comp. Pres. Doc.1770 (Oct. 10, 2006).

24. Remarks on the National Economy and the Federal Budget, 42 Weekly Comp. Pres. Doc. 1796 (Oct. 11, 2006).

25. Remarks at the National Renewable Energy Conference in St. Louis, Missouri, 42 Weekly Comp. Pres. Doc. 1802 (Oct. 12, 2006).

26. Statement on the Sixth Anniversary of the Terrorist Attack on the USS Cole, 42 Weekly Comp. Pres. Doc. 1813 (Oct. 12, 2006).

27. Remarks Following a Meeting With the President's Management Council, 42 Weekly Comp. Pres. Doc. 1818 (Oct. 13, 2006).

28. Remarks on Signing the SAFE Port Act, 42 Weekly Comp. Pres. Doc. 1815 (Oct. 13, 2006).

29. Remarks on the United Nations Security Council Resolution on North Korea, 42 Weekly Comp. Pres. Doc. (Oct. 14, 2006).

30. Remarks at the United States Air Force Memorial Dedication in Arlington, Virginia, 42 Weekly Comp. Pres. Doc., 1828 (Oct. 14, 2006).

31. Remarks at the Iftaar Dinner, 42 Weekly Comp. Pres. Doc. 1830 (Oct. 16, 2006).

32. Remarks on Signing the Military Commissions Act of 2006, 42 Weekly Comp. Pres. Doc. 1831 (Oct. 17, 2006).

33. Remarks at a Swearing-In Ceremony for Mary E. Peters as Secretary of Transportation, 42 Weekly Comp. Pres. Doc. 1833 (Oct. 17, 2006).

34. Remarks Following a Tour of Victory Junction Gang Camp, Inc., in Randleman, North Carolina, 42 Weekly Comp. Pres. Doc. 1843 (Oct. 18, 2006).

35. Remarks at Waldo C. Falkener Elementary School in Greensboro, North Carolina, 42 Weekly Comp. Pres. Doc. 1837 (Oct. 18, 2006).

36. Remarks at a Reception for Congressional Candidate Don Sherwood and the Pennsylvania Victory Committee in La Plume, Pennsylvania, 42 Weekly Comp. Pres. Doc. 1844 (Oct. 19, 2006).

37. Remarks to Reporters at a CVS Pharmacy, 42 Weekly Comp. Pres. Doc. 1856 (Oct. 20, 2006).

38. Remarks Following a Meeting With Organizations That Support the United States Military in Iraq and Afghanistan, 42 Weekly Comp. Pres. Doc. 1862 (Oct. 20, 2006).

39. Remarks at a National Italian American Foundation Dinner, 42 Weekly Comp. Pres. Doc. 1867 (Oct. 20, 2006).

40. Remarks at Urban Trust Bank, 42 Weekly Comp. Pres. Doc. 1870 (Oct. 23, 2006).

41. Remarks Following a Tour of Gyrocam Systems, LLC, in Sarasota, 42 Weekly Comp. Pres. Doc. 1876 (Oct. 24, 2006).

Radio Address (9)

1. The President's Radio Address, 42 Weekly Comp. Pres. Doc. 1595 (Sept. 9, 2006).

2. The President's Radio Address, 42 Weekly Comp. Pres. Doc. 1626 (Sept. 16, 2006).

3. The President's Radio Address, 42 Weekly Comp. Pres. Doc. 1664 (Sept. 23, 2006).

4. The President's Radio Address, 42 Weekly Comp. Pres. Doc. 1706 (Sept. 30 2006).

5. The President's Radio Address, 42 Weekly Comp. Pres. Doc. 1765 (Oct. 7, 2006).

6. The President's Radio Address, 42 Weekly Comp. Pres. Doc. 1827, (Oct. 14, 2006).

7. The President's Radio Address, 42 Weekly Comp. Pres. Doc. 1869, (Oct. 27, 2006).

8. The President's Radio Address, 42 Weekly Comp. Pres. Doc. 1907, (Oct 28, 2006).

9. The President's Radio Address, 42 Weekly Comp. Pres. Doc. 1984, (Nov. 4, 2006).

Media (3)

1. The President's News Conference, 42 Weekly Comp. Pres. Doc. 1607 (Sept. 15, 2006).

2. The President's News Conference, 42 Weekly Comp. Pres. Doc. 1782 (Oct. 11, 2006).

3. The President's News Conference, 42 Weekly Comp. Pres. Doc. 1877, (Oct. 25, 2006).

Miscellaneous (4)

1. Statement on the Death of John J. "Buck" O' Neil, 42 Weekly Comp. Pres. Doc. 1767 (Oct. 7, 2006).

2. Acts Approved by the President, 42 Weekly Comp. Pres. Doc. 1821 (Oct. 6-13, 2006).

3. Message on the Observance of Eid al-Fitr (a Muslim festival) 42 Weekly Comp. Pres. Doc. 1870 (Oct. 20, 2006).

4. Acts Approved by the President, 42 Weekly Comp. Pres. Doc. 1864 (Oct. 13-16, 2006).

Appendix B

FLOOR VOTES IN THE HOUSE OF REPRESENTATIVES AND THE SENATE DURING THE SIXTY DAYS PRIOR TO GENERAL ELECTION IN 2004 AND 2006

HOUSE OF REPRESENTATIVES – 2004*

1. 530; H.R. 4567, 108th Cong. (2004). 10/9/04; Agreed to the Conference Report on Making appropriations for the Department of Homeland Security for the fiscal year ending September 30, 2005, and for other purposes.**

2. 529; H.R. 4837, 108th Cong. (2004). 10/9/04; Agreed to the Conference Report on Making appropriations for military construction, family housing, and base realignment and closure for the Department of Defense for the fiscal year ending September 30, 2005, and for other purposes.

3. 528; H.R. 4200, 108th Cong. (2004). 10/9/04; Agreed to Conference Report on DOD Authorization, Fiscal Year 2005.

4. 527; H.R. Con. Res. 518, 108th Cong. (2004). 10/9/04; Agreed to the Resolution Providing for an adjournment or recess of the two Houses.

5. 526; H.R. Res. 845, 108th Cong. (2004). 10/8/04; Tabled H.R. Res. 845.

6. 525; S. 2845, 108th Cong. (2004). 10/8/04; On Motion to Instruct Conferees To reform the intelligence community and

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*. The 2004 federal election occurred on November 2nd. Sixty days prior to the Federal Election Day was September 3rd. The following Floor Votes, Numbers 422-530, occurred in the House of Representatives during that time, as listed below in reverse chronological order.

**. The votes are referenced by vote number, bill citation, date of vote, description, and title.

the intelligence and intelligence-related activities of the United States Government, and for other purposes – Failed.

7. 524; H.R. Res. 843, 108th Cong. (2004). 10/8/04; Ordered the Previous Question regarding Waiving points of order against the conference report to accompany H.R. 4200, National Defense Authorization Act for fiscal year 2005.

8. 523-510; H.R. 10, 108th Cong. (2004). 10/8/04; Amendments, Motions, and Passage of the 9/11 Recommendations Implementation Act.

9. 509; H.R. 4520, 108th Cong. (2004). 10/7/04; Agreed to the Conference Report on American Jobs Creation Act.

10. 508; H.R. 5061, 108th Cong. (2004). 10/7/04; Agreed To provide assistance for the current crisis in the Darfur region of Sudan and to facilitate a comprehensive peace in Sudan.

11. 507; S. 1134, 108th Cong. (2004). 10/7/04; Agreed To reauthorize and improve the programs authorized by the Public Works and Economic Development Act of 1965.

12. 506; H.R. Res. 828, 108th Cong. (2004). 10/7/04; Agreed to Waiving a requirement of clause 6(a) of rule XIII with respect to consideration of certain resolutions reported from the Committee on Rules.

13. 505; H.R. 5186, 108th Cong. (2004). 10/7/04; Passed the Taxpayer-Teacher Protection Act.

14. 504; H.R. 5213, 108th Cong. (2004). 10/7/04; Passed the Research Review Act.

15. 503; H.R. 4661, 108th Cong. (2004). 10/7/04; Passed the Internet Spyware (I-SPY) Prevention Act.

16. 502; H.R. 4567, 108th Cong. (2004). 10/7/04; Agreed to Making appropriations for the Department of Homeland Security for the fiscal year ending September 30, 2005, and for other purposes.

17. 501-500; H.R. 5212, 108th Cong. (2004). 10/6/04; Amendment to and Passage of the Making emergency

supplemental appropriations for the fiscal year ending September 30, 2005, for additional disaster assistance relating to storm damage, and for other purposes.

18. 499; H.R. Res. 819, 108th Cong. (2004). 10/6/04; Ordered the Previous Question regarding Providing for consideration of the bill (H.R. 5212) making emergency supplemental appropriations for fiscal year ending September 30, 2005, for additional disaster assistance relating to storm damage, and for other purposes.

19. 498; H.R. 4850, 108th Cong. (2004). 10/6/04; Agreed to the Conference Report on the District of Columbia Appropriations Act for 2005.

20. 497; H.R. 5107, 108th Cong. (2004). 10/6/04; Passed the Justice for All Act.

21. 496; H.R. 5011, 108th Cong. (2004). 10/5/04; Passed the Military Personnel Financial Services Protection Act.

22. 495; H.R. 2929, 108th Cong. (2004). 10/5/04; Passed the SPY ACT.

23. 494; H.R. 163, 108th Cong. (2004). 10/5/04; On Motion to Suspend the Rules and Pass the Universal National Service Act – Failed.

24. 493-492; S. 878, 108th Cong. (2004). 10/5/04; On Amendment to and Motion to Recommit with Instructions on Authorizing an additional permanent judgeship in the district of Idaho, and for other purposes – Failed.

25. 491-490; H.R. Res. 814, 108th Cong. (2004). 10/5/04; Agreed to Providing for consideration of the bill (S. 878) to authorize an additional permanent judgeship in the district of Idaho, and for other purposes.

26. 489; H.R. Res. 567, 108th Cong. (2004). 10/4/04; Agreed to Congratulating the American Dental Association for sponsoring the second annual Give Kids a Smile program which emphasizes the need to improve access to dental care for

children, and thanking dentists for volunteering their time to help provide needed dental care.

27. 488; S. 1814, 108th Cong. (2004). 10/4/04; Agreed To transfer Federal lands between the Secretary of Agriculture and the Secretary of the Interior.

28. 487; S. Con. Res. 76, 108th Cong. (2004). 10/4/04; Agreed to Recognize that November 2, 2003, shall be dedicated to A Tribute to Survivors at the United States Holocaust Memorial Museum.

29. 486; H.R. Res. 792, 108th Cong. (2004). 9/30/04; Agreed to Honoring the United Negro College Fund on the occasion of the Funds 60th anniversary and the Funds unflagging dedication to enhancing top quality college opportunities to millions of students.

30. 485; H.R. Con. Res. 501, 108th Cong. (2004). 9/30/04; Agreed to Honoring the life and work of Duke Ellington, recognizing the 30th anniversary of the Duke Ellington School of the Arts, and supporting the annual Duke Ellington Jazz Festival.

31. 484; H.R.J. RES. 106, 108th Cong. (2004). 9/30/04; Proposing an amendment to the Constitution of the United States relating to marriage – Failed.

32. 483; H.R. 4231, 108th Cong. (2004). 9/30/04; Passed the Department of Veterans Affairs Nurse Recruitment and Retention Act of 2004.

33. 482; H.R. 5149, 108th Cong. (2004). 9/30/04; On Motion to Suspend the Rules and Pass, P, Welfare Reform Extension Act, Part VIII.

34. 481-480; H.R. 5183, 108th Cong. (2004). 9/30/04; Passed the Surface Transportation Extension Act of 2004, Part V.

35. 479-478; H.R.J. RES. 107, 108th Cong. (2004). 9/29/04; Passed Continuing Appropriations for FY 2005.

36. 477; H.R. 3193, 108th Cong. (2004). 9/29/04; Passed the District of Columbia Personal Protection Act.
37. 476; H.R. 4520, 108th Cong. (2004). 9/29/04; On Motion to Instruct Conferees on the American Jobs Creation Act – Failed.
38. 475; S. 2363, 108th Cong. (2004). 9/28/04; Agreed to revise and extend the Boys and Girls Clubs of America.
39. 474-473; H.R. 4200, 108th Cong. (2004). 9/28/04; Agreed to Motion to Instruct Conferees and Close Portions of the Conference on DOD Authorization for Fiscal Year 2005.
40. 472; H.R. 1308, 108th Cong. (2004). 9/23/04; Agreed to amend the Internal Revenue Code of 1986 to end certain abusive tax practices, to provide tax relief and simplification, and for other purposes.
41. 471-470; H.R. Res. 794, 108th Cong. (2004). 9/23/04; Agreed to Waiving points of order against the conference report to accompany the bill (H.R. 1308) to amend the Internal Revenue Code of 1986 to accelerate the increase in the refundability of the child tax credit, and for other purposes.
42. 469; H.R. Res. 785, 108th Cong. (2004). 9/23/04; Ordered the Previous Question Waiving a requirement of clause 6(a) of rule XIII with Respect to consideration of certain resolutions reported from the Committee on Rules.
43. 468; H.R. 1057, 108th Cong. (2004). 9/23/04; Passed The Adoption Tax Relief Guarantee Act.
44. 467-466; H.R. 2028, 108th Cong. (2004). 9/23/04; Amended and Passed the Pledge Protection Act.
45. 465-452; H.R. 5025, 108th Cong. (2004). 9/22/04; Amendments, Motions and Passage of the Transportation and Related Agencies Appropriations for FY 2005.
46. 451; H.R. Res. 770, 108th Cong. (2004). 9/14/04; Ordered the Previous Question on Providing for consideration of the bill (H.R. 5025) making appropriations for the Departments of

Transportation and Treasury, and independent agencies for the fiscal year ending September 30, 2005, and for other purposes.
47. 450-448; H.R. 4571, 108th Cong. (2004). 9/14/04; On Amendment, Motion, and Passage of the Lawsuit Abuse Reduction Act.
48. 447; H.R. 1084, 108th Cong. (2004). 9/14/04; Passed the Volunteer Pilot Organization Protection Act.
49. 446; H.R. 1787, 108th Cong. (2004). 9/14/04; Passed the Good Samaritan Volunteer Firefighter Assistance Act.
50. 445; H.R. 3369, 108th Cong. (2004). 9/14/04; Passed the Nonprofit Athletic Organization Protection Act.
51. 444; H.R. Res. 766, 108th Cong. (2004). 9/14/04; Agreed to Providing for consideration of the bill (H.R. 4571) to amend rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.
52. 443; H.R. Res. 760, 108th Cong. (2004). 9/13/04; Agreed to Condemning the series of terrorist attacks against the Russian Federation that occurred in late August and early September 2004.
53. 442; H.R. Res. 667, 108th Cong. (2004). 9/13/04; Agreed to Expressing support for freedom in Hong Kong.
54. 441; H.R. Con. Res. 363, 108th Cong. (2004). 9/13/04; Agreed to Expressing the grave concern of Congress regarding the continuing gross violations of human rights and civil liberties of the Syrian people by the Government of the Syrian Arab Republic.
55. 440-434; H.R. 5006, 108th Cong. (2004). 9/9/04; Amendments and Passage of Making appropriations for the Departments of Labor, Health and Human Services, and Education, and related agencies for the fiscal year ending September 30, 2005, and for other purposes.
56. 433; S. 2634, 108th Cong. (2004). 9/9/04; Passed the Garrett Lee Smith Memorial Act.

57. 432; H.R. 1308, 108th Cong. (2004). 9/9/04; On Motion to Instruct Conferees to amend the Internal Revenue Code of 1986 to end certain abusive tax practices, to provide tax relief and simplification, and for other purposes – Failed.
58. 431; H.R. Res. 757, 108th Cong. (2004). 9/9/04; Agreed to Expressing the sense of the House of Representatives on the anniversary of the terrorist attacks launched against the United States on September 11, 2001.
59. 430-425; H.R. 5006, 108th Cong. (2004). 9/8/04; Agreed to Motion that the Committee Rise Making appropriations for the Departments of Labor, Health and Human Services, and Education, and related agencies for the fiscal year ending September 30, 2005, and for other purposes.
60. 424; H.R. Res. 754, 108th Cong. (2004). 9/8/04; Ordered the Previous Question regarding Providing for consideration of the bill (H. R. 5006) making appropriations for the Departments of Labor, Health and Human Services, and Education, and related agencies for the fiscal year ending September 30, 2005, and for other purposes.
61. 423; H.R. 4556, 108th Cong. (2004). 9/7/04; Passed the General William Cary Lee Post Office Building.
62. 422; H.R. 4381, 108th Cong. (2004). 9/7/04; Passed the Harvey and Bernice Jones Post Office Building.

UNITED STATES SENATE – 2004*

1. 211-210; H.R. 4520, 108th Cong. (2004). 10/11/04; Agreed to Conference Report on H.R. 4520, American Jobs Creation Act of 2004.

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*. The 2004 federal election occurred on November 2nd. Sixty days prior to the Federal Election Day was September 3rd. The following Floor Votes, Numbers 164-211, listed here in reverse chronological order, occurred on the floor of the United States Senate during that time.

2. 209; S. Res. 454, 108th Cong. (2004). 10/9/04; Agreed to S. Res. 454, A resolution expressing the sense of the Senate that the 108th Congress should provide the necessary funds to make disaster assistance available for all customarily eligible agricultural producers as emergency spending and not funded by cuts to the farm bill.

3. 208-200; S. Res. 445, 108th Cong. (2004). 10/9/04; Agreed to S. Res. 445 As Amended, A resolution to eliminate certain restrictions on service of a Senator on the Senate Select Committee on Intelligence.

4. 199-189; S. 2845, 108th Cong. (2004). 10/6/04; Amendments to and passage of S. 2845 As Amended, Intelligence Reform and Terrorism Prevention Act of 2004.

5. 188; H.R. 1308, 108th Cong. (2004). 9/23/04; Agreed to the Conference Report on H.R. 1308, the Working Families Tax Relief Act of 2004.

6. 187; P.N. 1855, 108th Cong. (2004). 9/22/04; Confirmed Porter J. Goss, of Florida, To Be Director of Central Intelligence.

7. 186; H.R. 4755, 108th Cong. (2004). 9/21/04; Passed H.R. 4755, Legislative Branch Appropriations Act for 2005.

8. 185; H.R. 4837, 108th Cong. (2004). 9/20/04; Passed H.R. 4837, as amended, Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act for 2005.

9. 184-166; H.R. 4567, 108th Cong. (2004). 9/14/04; Amendments to an Passage of H.R. 4567 As Amended, Department of Homeland Security Appropriations Act for 2005.

10. 165; P.N. 1628, 108th Cong. (2004). 9/7/04; Confirmed Michael H. Schneider, Sr., of Texas, to be U.S. District Judge.

11. 164; P.N. 1539, 108th Cong. (2004). 9/7/04; Confirmed Virginia Maria Hernandez Covington, of Florida, to be U.S. District Judge.

HOUSE OF REPRESENTATIVES – 2006*

1. 516; H.R. 4954, 109th Cong. (2006). 9/30/06; Agreed to the Conference Report on the Security and Accountability for Every Port (SAFE) Act.

2. 515; S. 3661, 109th Cong. (2006). 9/29/06; Passed the Wright Amendment Reform Act.

3. 514-13; MOTION, 109th Cong. (2006). 9/29/06; On motions to the previous question and to refer the Resolution – Passed.

4. 512; H.R. Res. 1064, 109th Cong. (2006). 9/29/06; Agreed to Waiving points of order against the conference report to accompany the bill (H.R. 4954) to improve maritime and cargo security.

5. 511; H.R. 4772, 109th Cong. (2006). 9/29/06; Passed the Private Property Rights Implementation Act of 2006.

6. 510; H.R. 5122, 109th Cong. (2006). 9/29/06; Agreed to the Conference Report on the National Defense Authorization Act for Fiscal Year 2007.

7. 509; H.R. 5441, 109th Cong. (2006). 9/29/06; Agreed to the Conference Report on the Department of Homeland Security Appropriations Act for 2007.

8. 508; S. 3930, 109th Cong. (2006). 9/29/06; Passed the Military Commissions Act.

9. 507-506; H.R. Res. 1053, 109th Cong. (2006). 9/29/06; Agreed to Waiving a requirement of clause 6(a) of rule XIII

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*. The 2006 federal election occurred on November 7th. Sixty days prior to the Federal Election Day was September 8th. The following Floor Votes, Numbers 436-516, occurred on the floor of the House of Representatives during that time, as listed below in reverse chronological order.

with respect to consideration of certain resolutions reported from the Committee on Rules.

10. 505-504; H.R. Res. 1054, 109th Cong. (2006). 9/29/06; Agreed to Waiving points of order against the conference report on H.R. 5441, Department of Homeland Security Appropriations for FY 2007, and providing for the consideration of S. 3930, Military Commissions Act and H.R. 4772, Private Property Rights Implementation Act.

11. 503; H.R. 6143, 109th Cong. (2006). 9/28/06; Passed the Ryan White HIV/AIDS Treatment Modernization Act.

12. 502-501; H.R. 5825, 109th Cong. (2006). 9/28/06; Passed the Electronic Surveillance Modernization Act.

13. 500; H.R. 4954, 109th Cong. (2006). 9/28/06; Agreed to Motion to Instruct Conferees on the Security and Accountability for Every Port (SAFE) Act.

14. 499-498; H.R. Res. 1052, 109th Cong. (2006). 9/28/06; Agreed to Providing for the consideration of H.R. 5825, Electronic Surveillance Modernization Act.

15. 497-476; H.R. Res. 1046, 109th Cong. (2006). 9/28/06; Agreed to Waiving the requirement of clause 6(a) of rule XIII with respect to consideration of certain resolutions reported from the Committee on Rules.

16. 495; H.R. Res. 1045, 109th Cong. (2006). 9/28/06; Ordering the Previous Question on providing for the consideration of motions to suspend the rules.

17. 494; S. 2856, 109th Cong. (2006). 9/27/06; Passed the Financial Services Regulatory Relief Act.

18. 493; H.R. 6115, 109th Cong. (2006). 9/27/06; Passed the Market-to-Market Extension Act.

19. 492; H.R. 5637, 109th Cong. (2006). 9/27/06; Passed the Nonadmitted and Reinsurance Reform Act of 2006.

20. 491-490; H.R. 6166, 109th Cong. (2006). 9/27/06; Passed the Military Commissions Act.

21. 489-488; H.R. Res. 1042, 109th Cong. (2006). 9/27/06; Agreed to Providing for the consideration of H.R. 6166, Military Commissions Act.
22. 487; H.R. Con. Res. 483, 109th Cong. (2006). 9/27/06; Agreed to resolution providing for an adjournment or recess of the two Houses.
23. 486; H.R. 5631, 109th Cong. (2006). 9/26/06; Agreed to the Conference Report on the Department of Defense Appropriations Act for 2007.
24. 485; H.R. 6164, 109th Cong. (2006). 9/26/06; Passed the National Institutes of Health Reform Act.
25. 484; H.R. Res. 1017, 109th Cong. (2006). 9/26/06; Agree to Affirming support for the sovereignty and security of Lebanon and the Lebanese people.
26. 483; H.R. Res. 989, 109th Cong. (2006). 9/26/06; Agreed to Commending the United Kingdom for its efforts in the War on Terror, and for other purposes.
27. 482; H.R. Res. 992, 109th Cong. (2006). 9/26/06; Agreed to Urging the President to appoint a Presidential Special Envoy for Sudan.
28. 481; H.R. Res. 723, 109th Cong. (2006). 9/26/06; Agreed to Calling on the President to take immediate steps to help improve the security situation in Darfur, Sudan, with specific emphasis on civilian protection.
29. 480; H.R. 2679, 109th Cong. (2006). 9/26/06; Passed the Public Expression of Religion Act.
30. 479; S. 403, 109th Cong. (2006). 9/26/06; Passed the Child Custody Protection Act.
31. 478; MOTION, 109th Cong. (2006). 9/26/06; Motion to resolve into secret session – Failed.
32. 477; H.R. 4772, 109th Cong. (2006). 9/26/06; On Motion to Suspend the Rules and Pass, as Amended - Failed, Private Property Rights Implementation Act of 2006.

33. 476; H.R. 5092, 109th Cong. (2006). 9/26/06; Passed the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE) Modernization and Reform Act.
34. 475; H.R. Res. 1039, 109th Cong. (2006). 9/26/06; Agreed to Providing for the consideration of S. 403, Child Custody Protection Act.
35. 474; H.R. Res. 1038, 109th Cong. (2006). 9/26/06; Agreed to Providing for the consideration of H.R. 2679, Public Expression of Religion Act.
36. 473; H.R. 6102, 109th Cong. (2006). 9/25/06; Passed the Captain Christopher Petty Post Office Building.
37. 472; H.R. 5062, 109th Cong. (2006). 9/25/06; On Motion to Suspend the Rules and Pass - Failed, New Hampshire Wilderness Act.
38. 471; H.R. 5059, 109th Cong. (2006). 9/25/06; On Motion to Suspend the Rules and Pass - Failed, New Hampshire Wilderness Act.
39. 470, S. 2832, 109th Cong. (2006). 9/21/06; On Motion to Suspend the Rules and Pass - Failed, Appalachian Regional Development Act Amendments of 2006.
40. 469; H.R. 4830, 109th Cong. (2006). 9/21/06; Passed the Border Tunnel Prevention Act of 2006.
41. 468-467; H.R. 6095, 109th Cong. (2006). 9/21/06; Passed the Immigration Law Enforcement Act of 2006.
42. 466; H.R. 5631, 109th Cong. (2006). 9/21/06; Closed Portions of the Conference on the Department of Defense Appropriations Act for 2007.
43. 465-464; H.R. 6094, 109th Cong. (2006). 9/21/06; Passed the Community Protection Act of 2006.
44. 463; S. 418, 109th Cong. (2006). 9/21/06; Passed the Military Personnel Financial Services Protection Act.
45. 462-461; H.R. Res. 1018, 109th Cong. (2006). 9/21/06; Agreed to Providing for the consideration of the bills (H.R.

4830) Border Tunnel Prevention Act of 2006, (H.R. 6094) Community Protection Act of 2006, and (H.R. 6095) Immigration Law Enforcement Act of 2006.

46. 460; H.R. Res. 976, 109th Cong. (2006). 9/20/06; Agreed to Condemning human rights abuses by the Government of the Islamic Republic of Iran and expressing solidarity with the Iranian people.

47. 459-458; H.R. 4844, 109th Cong. (2006). 9/20/06; Passed the Federal Election Integrity Act of 2006.

48. 457; H.R. Res. 942, 109th Cong. (2006). 9/20/06; Agreed to Recognizing the centennial anniversary on August 5, 2006, of the Iranian constitution of 1906.

49. 456-454; H.R. Res. 1015, 109th Cong. (2006). 9/20/06; Agreed to Providing for consideration of the bill (H.R. 4844) to amend the National Voter Registration Act of 1993 to require any individual who desires to register or re-register to vote in an election for Federal office to provide the appropriate State election official with proof that the individual is a citizen of the U.S.

50. 453; H.R. Con. Res. 415, 109th Cong. (2006). 9/19/06; Agreed to Condemning the repression of the Iranian Bahai community and calling for the emancipation of Iranian Bahais.

51. 452; H.R. Res. 622, 109th Cong. (2006). 9/19/06; Agreed to recognize and honor the Filipino World War II veterans for their defense of democratic ideals and their important contributions to the outcome of World War II.

52. 451; H.R. Con. Res. 210, 109th Cong. (2006). 9/19/06; Agreed to Supporting the goal of eliminating suffering and death due to cancer by the year 2015.

53. 450; H.R. 6033, 109th Cong. (2006). 9/14/06; Passed the Thomas J. Manton Post Office Building.

54. 449-448; H.R. Res. 1003, 109th Cong. (2006). 9/14/06; Agreed to Providing for the adoption of the resolution (H.R.

Res. 1000) providing for earmarking reform in the House of Representatives.

55. 447; H.R. 2864, 109th Cong. (2006). 9/14/06; Motion to instruct Conferees passes on the Water Resources Development Act.

56. 446-45; H.R. 6061, 109th Cong. (2006). 9/14/06; Motion and Final passage of Secure Fence Act of 2006 - Failed.

57. 444; H.R. Res. 1002, 109th Cong. (2006). 9/14/06; Agreeing to Providing for the consideration of H.R. 6061, Secure Fence Act of 2006.

58. 443-441; H.R. 2665, 109th Cong. (2006). 9/14/06; Amendments (failed) and Passage of the Federal Prison Industries Competition in Contracting Act.

59. 440; H.R. Res. 994, 109th Cong. (2006). 9/13/06; Agreeing to Expressing the sense of the House of Representatives on the fifth anniversary of the terrorist attacks launched against the United States on September 11, 2001.

60. 439; H.R. 4893, 109th Cong. (2006). 9/13/06; Failed motion to suspend the rules and pass the Restricting Indian Gaming to Homelands of Tribes Act of 2006.

61. 438; H.R. Res. 996, 109th Cong. (2006). 9/13/06; Passage of a resolution Providing for the consideration of H.R. Res. 994, expressing the sense of the House of Representatives on the fifth anniversary of the terrorist attacks launched against the United States on September 11, 2001.

62. 437; H.R. Res. 175, 109th Cong. (2006). 9/12/06; Suspended the rules and agreed to Recognizing the importance of establishing a national memorial at the World Trade Center site to commemorate and mourn the events of February 26, 1993, and September 11, 2001.

63. 436; H.R. 5428, 109th Cong. (2006). 9/12/06; Passage of the designation of the Joshua A. Terando Princetŏn Post Office Building.

UNITED STATES SENATE – 2006*

1. 263; S. 403, 109th Cong. (2006). 9/29/06; Rejected motion to concur with House on the Child Interstate Abortion Notification Act.

2. 262, 260, & 252; H.R. 6061, 109th Cong. (2006). 9/20 & 28-29 /06; Amendments, motions, and final passage of the Secure Fence Act of 2006.

3. 261; H.R. 5631, 109th Cong. (2006). 9/29/06; Agreement to conference report on the Department of Defense Appropriations Act for 2007.

4. 259-254; S. 3930, 109th Cong. (2006). 9/27-28/06; Amendments and passage of Military Commission Act of 2006.

5. 253; P.N. 1586, 109th Cong. (2006). 9/25/06; Confirmation Francisco Augusto Besosa, of Puerto Rico, to be U.S. District Judge.

6. 251; P.N. 358, 109th Cong. (2006). 9/19/06; Confirmation Alice S. Fisher, of Virginia, to be an Assistant Attorney General.

7. 250; H.R. 5684, 109th Cong. (2006). 9/19/06; Passage of the United States-Oman Free Trade Agreement Implementation Act.

8. 249-240; H.R. 4954, 109th Cong. (2006). 9/12-14/06; A series of national security, war, homeland security, etc. amendments to and final passage of the SAFE Port Act.

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*. The 2006 federal election occurred on November 7th. Sixty days prior to the Federal Election Day was September 8th. The following Floor Votes, Numbers 240-263, occurred on the floor of the United States Senate during that time.

Appendix C

COMMITTEE HEARINGS OF THE HOUSE OF REPRESENTATIVES AND THE SENATE DURING THE SIXTY DAY PERIOD PRIOR TO THE GENERAL ELECTION 2004 AND 2006

2004 COMMITTEE HEARINGS*

1. Oct. 8, 2004; *The Nation's Flu Shot Shortage: How It Happened and Where We Go from Here: Hearing Before the H. Comm. on Government Reform*, 108th Cong. (2004).**
2. Oct. 8, 2004; *Peacekeeping in Africa: Challenges and Opportunities: Hearing Before the H. Subcomm. on Africa of the H. Comm. on Foreign Relations*, 108th Cong. (2004).
3. Oct. 8, 2004; *Employment Situation, Sept. 2004: Hearing Before the J. Economic Comm.*, 108th Cong. (2004).
4. Oct. 7, 2004; *Mortgage Fraud and Its Impact on Mortgage Lenders: Hearing before the H. Subcomm. on Housing and Community Opportunity of the H. Comm. on Financial Services*, 108th Cong. (2004).
5. Oct. 7, 2004; *Federal Offender Reentry and Protecting Children from Criminal Recidivists: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. (2004).
6. Oct. 7, 2004; *Long-Run Economics of Natural Gas: J. Hearing Before the J. Comm. on Energy and Commerce*, 108th Cong. (2004).

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*. The 2004 federal election occurred on November 2nd. Sixty days prior to the Federal Election Day was September 3rd. The following Committee hearings, listed here in reverse chronological order, occurred during that time.

**. The hearings are referenced by the date of the hearing and the Committee Hearing Title.

7. Oct. 7, 2004; *Employment Situation, Sept. 2004: Hearing Before the J. Economic Comm.*, 108th Cong. (2004).
8. Oct. 7, 2004; *Airline Industry Pension Plans: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004).
9. Oct. 6, 2004; *Federal Revenue Options: Hearing Before the H. Comm. on the Budget*, 108th Cong. (2004).
10. Oct. 6, 2004; *Child Product Safety: Do Current Standards Provide Enough Protection?: Hearing Before the H. Subcomm. on Commerce. Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. (2004).
11. Oct. 6, 2004; *OFHEO Report: Allegations of Accounting and Management Failure at Fannie Mae: Hearing Before the H. Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises of the H. Comm. on Financial Services*, 108th Cong. (2004).
12. Oct. 6, 2004; *Current Challenges in Combating the West Nile Virus: Hearing Before the H. Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the H. Comm. on Government Reform*, 108th Cong. (2004).
13. Oct. 6, 2004; *"Annual Report on International Religious Freedom 2004" and Designations of Countries of Particular Concern: Hearing Before the H. Comm. on International Relations*, 108th Cong. (2004).
14. Oct. 6, 2004; *U.S. Trade Disputes in Peru and Ecuador: Hearing Before the H. Subcomm. on the Western Hemisphere of the H. Comm. on International Relations*, 108th Cong. (2004).
15. Oct. 6, 2004; *Presidential Succession Act: Hearing Before the H. Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. (2004).
16. Oct. 6, 2004; *Maritime Domain Awareness: Hearing Before the H. Subcomm. on Coast Guard and Maritime*

Transportation of the H. Comm. on Transportation and Infrastructure, 108th Cong. (2004).

17. Oct. 6, 2004; *Department of Veterans Affairs Smart Card Projects: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Veterans' Affairs, 108th Cong. (2004).*

18. Oct. 6, 2004; *Nominations: Hearing Before the S. Comm. on Armed Services*, 108th Cong. (2004).

19. Oct. 6, 2004; *Report of the Special Advisor to the Director of Central Intelligence for Strategy Regarding Iraqi Weapons of Mass Destruction Programs: Hearing Before the S. Comm. on Armed Services*, 108th Cong. (2004).

20. Oct. 6, 2004; *Natural Gas: Hearing Before the S. Subcomm. on Competition, Foreign Commerce, And Infrastructure of the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004).

21. Oct. 6, 2004; *Addressing the New Reality of Current Visa Policy on International Students and Researchers: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. (2004).

22. Oct. 6, 2004; *East Asia Health Programs: Hearing Before the S. Subcomm. on East Asian and Pacific Affairs of the S. Comm. on Foreign Relations*, 108th Cong. (2004).

23. Oct. 6, 2004; *Intelligence Matters: Hearing Before the S. Select Comm. on Intelligence*, 108th Cong. (2004).

24. Oct. 6, 2004; *Bioshield II: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions and the S. Comm. on the Judiciary*, 108th Cong. (2004).

25. Oct. 5, 2004; *Neglected Diseases in East Asia: Are Public Health Programs Working? Part 8: Influenza Vaccine: Hearing Before the H. Subcomm. on Labor, Health and Human Services, Education and Related Agencies of the H. Comm. on Appropriations*, 108th Cong. (2004).

26. Oct. 5, 2004; *The U.N. Oil for Food Program: Cash Cow Meets Paper Tiger: Hearing Before the H. Subcomm. on National Security, Emerging Threats and International Relations of the H. Comm. on Government Reform*, 108th Cong. (2004).

27. Oct. 5, 2004; *Peer-to-Peer Piracy on University Campuses: An Update: Hearing Before the H. Subcomm. on the Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. (2004).

28. Oct. 5, 2004; *Free and Fair Presidential Election, and for Reaffirming Serbia's Commitment to Peace, Democracy, and the Rule of Law, Calling on Government of Libya To Review Legal Actions Taken Against Bulgarian Medical Workers, Urging the President of the EU To Add Hezbollah to EU's Wide-Ranging List of Terrorist Organizations, Pledging Continued U.S. support for the sovereignty, independence, territorial integrity, and democratic and economic reforms of the Republic of Georgia: Hearing Before the H. Subcomm. on Europe of the H. Comm. on International Relations*, 108th Cong. (2004).

29. Oct. 5, 2004; *Nomination of Pamela Hughes Patenaude: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. (2004).

30. Oct. 5, 2004; *Universal Service E-Rate Program: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004).

31. Oct. 5, 2004; *Millennium Challenge Corporation: A Progress Report: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. (2004).

32. Oct. 5, 2004; *Nomination of Gregory Eugene Jackson: Hearing Before the S. Comm. on Governmental Affairs*, 108th Cong. (2004).

33. Oct. 5, 2004; *Reducing Childhood Obesity: Public-Private Partnerships To Improve Nutrition and Increase Physical Activity in Children: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 108th Cong. (2004).
34. Oct. 5, 2004; *Maximizing Voter Choice: Opening the Presidency to Naturalized Americans: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2004).
35. Oct. 5, 2004; *BioShield II: Responding to an Ever-Changing Threat: J. Hearing Before the S. Comm. on the Judiciary and the S. Comm. on Health, Education, Labor, and Pensions*, 108th Cong. (2004).
36. Oct. 4, 2004; *Nominations: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2004).
37. Sept. 30, 2004; *Secret Ballot Protection Act of 2004: Hearing on H.R. 4343 Before the H. Subcomm. on Employer-Employee Relations of the H. Comm. on Education and Workforce*, 108th Cong. (2004).
38. Sept. 30, 2004; *Controlling Bioterror: Assessing Our Nation's Drinking Water Security: Hearing Before the H. Subcomm. on Environment and Hazardous Materials of the H. Comm. on Energy and Commerce, 108th Cong. (2004).*
39. Sept. 30, 2004; *Combating International Terrorist Financing: J. Hearing Before the H. Subcomm. on Domestic and International Monetary Policy, Trade, and Technology and the H. Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 108th Cong. (2004).
40. Sept. 30, 2004; *How Can We Maximize Private Sector Participation in Transportation?--Part II: Hearing Before the H. Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the H. Comm. on Government Reform*, 108th Cong. (2004).
41. Sept. 30, 2004; *Financial Management at the Department of Health and Human Services: Hearing on H.R. 4368 Before*

the H. Subcomm. on Government Efficiency and Financial Management of the H. Comm. on Government Reform, 108th Cong. (2004).

42. Sept. 30, 2004; *Comprehensive Peace in Sudan Act: Hearing Before the H. Subcomm. On Africa of the H. Comm. on International Relations*, 108th Cong. (2004).

43. Sept. 30, 2004; *A Bill To Transfer the National Oceanic and Atmospheric Administration to the Department of the Interior: Hearing Before the H. Subcomm. on Fisheries Conservation, Wildlife and Oceans of the H. Comm. on Resources*, 108th Cong. (2004).

44. Sept. 30, 2004; *Are Citizen Suit Provisions of the Clean Water Act Being Misused?: Hearing Before the H. Subcomm. on Water Resources and Environment of the H. Comm. on Transportation and Infrastructure*, 108th Cong. (2004).

45. Sept. 30, 2004; *The Commissioner of Social Security's Proposal to Improve the Disability Process, Inadequate Disclosure, Disparate State Tax Treatment, and Questionable Broker Sales Practices: Hearing Before the H. Subcomm. on Social Security and the H. Subcomm. of Human Resources of the H. Comm. on Ways and Means*, 108th Cong. (2004).

46. Sept. 30, 2004; *Disrupting Terrorist Travel: Safeguarding America's Borders Through Information Sharing: Hearing Before the H. Subcomm. on Infrastructure and Border Security and the H. Subcomm. on Intelligence and Counterterrorism of the H. Comm. on Homeland Security*, 108th Cong. (2004).

47. Sept. 30, 2004; *Internet Governance and Security: Hearing Before the S. Subcomm. on Communications of the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004).

48. Sept. 30, 2004; *The Disposal Availability of Low-Level Radioactive Waste: Hearing on P.L. 96-573 Before the S. Comm. on Energy and Natural Resources*, 108th Cong. (2004).

49. Sept. 30, 2004; *Oversight of College Savings Plans: Hearing Before the S. Subcomm. on Financial Management, the Budget, and International Security of the S. Comm. on Governmental Affairs*, 108th Cong. (2004).
50. Sept. 30, 2004; *Nominations: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2004) (reported favorably several federal judges).
51. Sept. 30, 2004; *Nominations: Hearing Before the S. Comm. on Veterans Affairs*, 108th Cong. (2004).
52. Sept. 29, 2004; *Review the Farm Credit System and Its Provisions for Associations To Exit the System, Schools Safely Acquiring Faculty Excellence Act: Hearing Before the H. Subcomm. on Conservation, Credit, Rural Development, and Research of the H. Comm. on Agriculture*, 108th Cong. (2004).
53. Sept. 29, 2004; *Improving Women's Health: Understanding Depression After Pregnancy: Hearing Before the H. Subcomm. on Health of the H. Comm. on Energy and Commerce*, 108th Cong. (2004).
54. Sept. 29, 2004; *An Examination of Wireless Directory Assistance Policies and Programs: Hearing Before the H. Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 108th Cong. (2004).
55. Sept. 29, 2004; *Afghanistan: Hearing Before the H. Comm. on International Relations*, 108th Cong. (2004).
56. Sept. 29, 2004; *Miscellaneous Measures: Hearing Before the H. Subcomm. on Forests and Forest Health of the H. Comm. on Resources*, 108th Cong. (2004).
57. Sept. 29, 2004; *National Incident Management System: Enhancing Response to Terrorist Attacks: Hearing Before the H. Subcomm. on Emergency Preparedness and Response of the H. Select Comm. on Homeland Security*, 108th Cong. (2004).

58. Sept. 29, 2004; *Terrorist Financing: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. (2004).

59. Sept. 29, 2004; *Stem Cell Research: Hearing Before the S. Subcomm. on Science, Technology, and Space of the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004).

60. Sept. 29, 2004; *Land Bills: Hearing Before the S. Subcomm. on Public Lands and Forests of the S. Comm. on Energy and Natural Resources,* 108th Cong. (2004).

61. Sept. 29, 2004; *Nominations: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. (2004).

62. Sept. 29, 2004; *Tribal Lobbying Matters: Hearing Before the S. Comm. on Indian Affairs*, 108th Cong. (2004).

63. Sept. 28, 2004; *Schools Safety Acquiring Faculty Excellence Act of 2004: Hearing Before the H. Subcomm. on 21st Century Competitiveness of the H. Comm. on Education and Workforce*, 108th Cong. (2004).

64. Sept. 28, 2004; *Protecting the Privacy of Consumers' Social Security Numbers: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. (2004).

65. Sept. 28, 2004; *Oversight of USDA Racial Discrimination Case: Hearing Before the H. Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. (2004).

66. Sept. 28, 2004; *Policies To Enforce the Bank Secrecy Act and Prevent Money Laundering in Money Services Businesses and the Gaming Industry: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. (2004).

67. Sept. 28, 2004; *Media Ownership: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004).

68. Sept. 28, 2004; *Media Ratings: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004).

69. Sept. 28, 2004; *Multilateral Development Banks: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. (2004).

70. Sept. 28, 2004; *Combating the Flu: Keeping Seniors Alive: Hearing Before the S. Comm. on Aging*, 108th Cong. (2004).

71. Sept. 24, 2004; *Iraq Reconstruction Program: Hearing Before the H. Subcomm. on Foreign Operations, Export Financing, and Related Programs of the H. Comm. on Appropriations*, 108th Cong. (2004).

72. Sept. 24, 2004; *Oversight on Sage Grouse Conservation: Hearing Before the S. Subcomm. on Fisheries, Wildlife, and Water of the S. Comm. on Environment and Public Works*, 108th Cong. (2004).

73. Sept. 24, 2004; *Treaties: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. (2004).

74. Sept. 23, 2004; *Are Current Safeguards Protecting Taxpayers Against Diploma Mills?: Hearing Before the H. Subcomm. on 21st Century Competitiveness of the H. Comm. on Education and Workforce*, 108th Cong. (2004).

75. Sept. 23, 2004; *FDA's Role in Protecting the Public Health: Examining FDA's Review of Safety and Efficacy Concerns in Anti-Depressant Use by Children: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 108th Cong. (2004).

76. Sept. 23, 2004; *Encouraging Small Business Growth and Access to Capital: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 108th Cong. (2004).

77. Sept. 23, 2004; *Intellectual Property Piracy: Are We Doing Enough To Protect U.S. Innovation Abroad: Hearing*

Before the H. Comm. on Government Reform, 108th Cong. (2004).

78. Sept. 23, 2004; *U.S. Security Policy in Afghanistan on Eve of National Elections: Hearing Before the H. Comm. on International Relations*, 108th Cong. (2004).

79. Sept. 23, 2004; *Oversight of Endangered Species: Hearing Before the H. Subcomm. on Fisheries Conservation, Wildlife, and Oceans of the H. Comm. on Resources*, 108th Cong. (2004).

80. Sept. 23, 2004; *Select Tax Issues: Hearing Before the H. Subcomm. on Select Revenue Measures of the H. Comm. on Ways and Means*, 108th Cong. (2004).

81. Sept. 23, 2004; *National Labor Relations Board Issues: Hearing Before the S. Subcomm. on Labor, Health and Human Services, Education, and Related Agencies of the S. Comm. on Appropriations*, 108th Cong. (2004).

82. Sept. 23, 2004; *Global Posture Review of U.S.: Hearing Before the S. Comm. on Armed Services*, 108th Cong. (2004).

83. Sept. 23, 2004; *Prescription Drug Abuse and Diversion: The Role of Prescription Drug Monitoring Programs: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 108th Cong. (2004).

84. Sept. 22, 2004; *Repairing the 21ST Century Car: Is Technology Locking the Consumer Out?: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. (2004).

85. Sept. 22, 2004; *Problems with the E-Rate Program: Waste, Fraud, and Abuse Concerns in the Wiring of Our Nation's Schools to the Internet: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 108th Cong. (2004).

86. Sept. 22, 2004; *Legislative Proposals To Implement the Recommendations of the 9/11 Commission: Hearing Before the H. Comm. on Financial Services*, 108th Cong. (2004).
87. Sept. 22, 2004; *Access to Recovery: Improving Participation and Access in Drug Treatment, Costs, Consequences, and Potential Solutions: Hearing Before the H. Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the H. Comm. on Government Reform*, 108th Cong. (2004).
88. Sept. 22, 2004; *Dietary Supplements: Nature's Answer to Cost Effective Preventative Medicine: Hearing Before the H. Subcomm. on Human Rights and Wellness of the H. Comm. on Government Reform*, 108th Cong. (2004).
89. Sept. 22, 2004; *Combating Terrorism: The 9/11 Commission Recommendations and the National Strategies: Hearing Before the H. Subcomm. on National Security, Emerging Threats, and International Relations of the H. Comm. on Government Reform*, 108th Cong. (2004).
90. Sept. 22, 2004; *Identity Theft: The Causes, Costs, Consequences, and Potential Solutions?: Hearing Before the H. Subcomm. on Technology, Information Policy, Intergovernmental Relations, and the Census of the H. Comm. on Government Reform*, 108th Cong. (2004).
91. Sept. 22, 2004; *Asia's Environmental Challenges: Hearing Before the H. Subcomm. on Asia and the Pacific of the H. Comm. on International Relations*, 108th Cong. (2004).
92. Sept. 22, 2004; *Disarmament of Libya's Weapons of Mass Destruction: Hearing Before the H. Subcomm. on International Terrorism, Nonproliferation, and Human Rights of the H. Comm. on International Relations*, 108th Cong. (2004).
93. Sept. 22, 2004; *Water Legislation: Hearing Before the H. Subcomm. on Water and Power of the H. Comm. on Resources*, 108th Cong. (2004).

94. Sept. 22, 2004; *Impact of High Natural Gas Prices on Small Farmers and Manufacturers: Hearing Before the H. Subcomm. on Rural Enterprise, Agriculture, and Technology of the H. Comm. on Small Business*, 108th Cong. (2004).

95. Sept. 22, 2004; *Trade Preferences for Haiti, Including the USA PATRIOT Act and the SAFE Act: Hearing Before the H. Subcomm. on Trade of the H. Comm. on Ways and Means*, 108th Cong. (2004).

96. Sept. 22, 2004; *Emergency Warning Systems: Ways To Notify the Public in the New Era of Homeland Security: Hearing Before the H. Subcomm. on Emergency Preparedness and Response of the H. Comm. on Homeland Security*, 108th Cong. (2004).

97. Sept. 22, 2004; *9/11 Commission Recommendations: Hearing Before the S. Comm. on Appropriations*, 108th Cong. (2004).

98. Sept. 22, 2004; *Examination and Oversight of the Condition and Regulation of the Insurance Industry: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. (2004).

99. Sept. 22, 2004; *Nomination of Lloyd O. Pierson: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. (2004).

100. Sept. 22, 2004; *Code Talkers: Hearing Before the S. Comm. on Indian Affairs*, 108th Cong. (2004).

101. Sept. 22, 2004; *Review of Counter-Terrorism Legislation and Proposals: Hearing Before the S. Comm. on Judiciary*, 108th Cong. (2004).

102. Sept. 22, 2004; *Nominations: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2004).

103. Sept. 22, 2004; *Expanding Consumer Choice and Addressing 'Adverse Selection' Concerns in Health Insurance: Hearing Before the J. Economic Comm.*, 108th Cong. (2004).

104.Sept. 21, 2004; *Keeping Seniors Healthy: New Perspective Benefits in the Medicare Modernization Act: Hearing Before the H. Subcomm. on Health of the H. Comm. on Energy and Commerce*, 108th Cong. (2004).
105.Sept. 21, 2004; *Pechanga Band of Luiseno Mission Indians Land Transfer Act: Hearing Before the H. Comm. on Resources*, 108th Cong. (2004).
106.Sept. 21, 2004; *Commission on Security and Cooperation in Europe: Human Trafficking: Hearing Before the H. Comm. on Armed Services*, 108th Cong. (2004).
107.Sept. 21, 2004; *Review of the 9/11 Commission's Intelligence Recommendations: Hearing Before the S. Comm. on Appropriations*, 108th Cong. (2004).
108.Sept. 21, 2004; *Commission on Ocean Policy: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004).
109.Sept. 21, 2004; *Wireless 411 Privacy Act: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004).
110.Sept. 21, 2004; *Harbert and Shaw Nominations: Hearing Before the S. Comm. on Energy and Natural Resources*, 108th Cong. (2004).
111.Sept. 21, 2004; *Petrified Forest in Arizona, Quincentennial of the Discovery of Florida, Harry S Truman National Historic Site, Hudson-Fulton-Champlain Commission, and Roaming Horses in Cape Lookout National Seashore: Hearing Before the S. Subcomm. on National Parks of the S. Comm. on Energy and Natural Resources*, 108th Cong. (2004).
112.Sept. 21, 2004; *Indian Jails: A Clarion Call for Reform: Hearing Before the S. Comm. on Finance*, 108th Cong. (2004).
113.Sept. 21, 2004; *Refugees: Seeking Solutions to a Global Concern: Hearing Before the S. Subcomm. on Immigration,*

Border Security, and Citizenship of the S. Comm. on Judiciary, 108th Cong. (2004).

114. Sept. 21, 2004; *Intelligence Matters: Hearing Before the S. Select Comm. on Intelligence*, 108th Cong. (2004).

115. Sept. 21, 2004; *American Legion: Hearing Before the S. Comm. on Veterans' Affairs and the H. Comm. on Veterans' Affairs*, 108th Cong. (2004).

116. Sept. 20, 2004; *Issues Affecting Rural Communities in the Southwest: National Forest Management and the Endangered Species Act: Hearing Before the H. Comm. on Resources*, 108th Cong. (2004).

117. Sept. 20, 2004; *Nomination: Hearing Before the S. Select Comm. on Intelligence*, 108th Cong. (2004).

118. Sept. 20, 2004; *Breaking the Silver Ceiling: A New Generation of Older Americans Redefining the New Rules of the Workplace: Hearing Before the S. Comm. on Aging*, 108th Cong. (2004).

119. Sept. 15, 2004; *Financial Services Issues: A Consumer's Perspective: Hearing Before the H. Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 108th Cong. (2004).

120. Sept. 15, 2004; *Making Networx Work: An Examination of GSA's Continuing Efforts To Create a Modern: Hearing Before the H. Comm. on Government Reform*, 108th Cong. (2004).

121. Sept. 15, 2004; *Evolving Role of the Federal CFO: Hearing Before the H. Subcomm. on Government Efficiency and Financial Management of the H. Comm. on Government Reform*, 108th Cong. (2004).

122. Sept. 15, 2004; *Conquering Obesity: The U.S. Approach to Combating this National Health Crisis: Hearing Before the H. Subcomm. on Human Rights and Wellness of the H. Comm. on Government Reform*, 108th Cong. (2004).

123.Sept. 15, 2004; *Combating Terrorism: The Role of the American Media: Hearing Before the H. Comm. on Homeland Security*, 108th Cong. (2004).

124.Sept. 15, 2004; *Climate Change: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004).

125.Sept. 15, 2004; *U.S. Assistance to Iraq: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. (2004).

126.Sept. 14, 2004; *Ratings Game: Improving Transparency and Competition Among the Credit Rating Agencies: Hearing Before the H. Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises of the H. Comm. on Financial Services*, 108th Cong. (2004).

127.Sept. 14, 2004; *Homeland Security: Monitoring Nuclear Power Plant Security: Hearing Before the H. Subcomm. on National Security, Emerging Threats, and International Relations of the H. Comm. on Government Reform*, 108th Cong. (2004).

128.Sept. 14, 2004; *Lessons Learned from the 2004 Overseas Census Test: Hearing Before the H. Subcomm. on Technology, Information Policy, Intergovernmental Relations, and the Census of the H. Comm. on Government Reform*, 108th Cong. (2004).

129.Sept. 14, 2004; *Malaria and Tuberculosis in Africa, Nevada, Designate Wilderness in Oregon, and Reforestation of Appropriate Forest Cover on Forest Land: Hearing Before the H. Subcomm. on Africa of the H. Comm. on International Relations*, 108th Cong. (2004).

130.Sept. 14, 2004; *U.S.-European Cooperation on Counterterrorism: Achievements and Challenges: Hearing Before the H. Subcomm. on Europe and the H. Subcomm. on International Terrorism, Nonproliferation, and Human Rights*

of the H. Comm. on International Relations, 108th Cong. (2004).

131.Sept. 14, 2004; *Due Process and the NCAA: Hearing Before the H. Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. (2004).

132.Sept. 14, 2004; *Homeland Security: The 9/11 Commission and the Course Ahead: Hearing Before the H. Comm. on Homeland Security*, 108th Cong. (2004).

133.Sept. 14, 2004; *Development in Lincoln County: Hearing Before the S. Subcomm. on Public Lands and Forests of the S. Comm. on Energy and Natural Resources*, 108th Cong. (2004).

134.Sept. 14, 2004; *9/11 Commission Human Capital Recommendations: A Critical Element of Reform: Hearing Before the S. Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia of the S. Comm. on Governmental Affairs*, 108th Cong. (2004).

135.Sept. 14, 2004; *Hospital Group Purchasing: How To Maintain Innovation and Cost Savings: Hearing Before the S. Subcomm. on Antitrust, Competition Policy, and Consumer Rights of the S. Comm. on Judiciary*, 108th Cong. (2004).

136.Sept. 14, 2004; *Nomination of the Honorable Porter J.: Hearing Before the S. Comm. on Intelligence*, 108th Cong. (2004).

137.Sept. 14, 2004; *Fresh Look at Mandatory Retirements: Do They Still Make Sense?: Hearing Before the S. Comm. on Aging*, 108th Cong. (2004).

138.Sept. 14, 2004; *Implementing the Medicare Prescription Drug Benefit and Medicare Advantage Program: Perspectives on the Proposed Rules: Hearing Before the S. Comm. on Finance*, 108th Cong. (2004).

139.Sept. 14, 2004; *Fishery Conservation and Management Amendments: Hearing Before the S. Subcomm. on Oceans,*

Fisheries, and Coast Guard of the S. Comm. on Commerce, Science, and Transportation, 108th Cong. (2004).

140.Sept. 13, 2004; *Constitution Restoration Act of 2004; : Hearing Before the H. Subcomm. on Courts, the Internet, and Intellectual Property of the S. Comm. on the Judiciary*, 108th Cong. (2004).

141.Sept. 13, 2004; *Effect of Television Violence on Children: What Policymakers Need To Know: Hearing Before the H. Comm. on Energy and Commerce*, 108th Cong. (2004).

142.Sept. 13, 2004; *You Can't Always Get What You Want: What If the Federal Government Could Drive Improvements in Healthcare?: Hearing Before the H. Comm. on Government Reform*, 108th Cong. (2004).

143.Sept. 13, 2004; *Examining Impacts of the Endangered Species Act on Southern California's Inland Empire: Hearing Before the H. Comm. on the Judiciary*, 108th Cong. (2004).

144.Sept. 13, 2004; *Ensuring the U.S. Intelligence Community Supports Homeland Defense and Departmental Needs: Hearing Before the S. Comm. on Governmental Affairs*, 108th Cong. (2004).

145.Sept. 13, 2004; *Tools to Fight Terrorism Act: Hearing Before the S. Subcomm. on Terrorism, Technology, and Homeland Security of the S. Comm. on the Judiciary*, 108th Cong. (2004).

146.Sept. 10, 2004; *Nominations: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. (2004).

147.Sept. 9, 2004; *Final Report Independent Panel to Review DOD Detention Operations: Hearing Before the H. Comm. on Armed Services*, 108th Cong. (2004).

148.Sept. 9, 2004; *ABU Ghraib Prison Facility: Investigation of Military Intelligence Activities: Hearing Before the H. Comm. on Armed Services*, 108th Cong. (2004).

149.Sept. 9, 2004; *Examining Professional Boxing: Are Further Reforms Needed?: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. (2004).

150.Sept. 9, 2004; *Publication and Disclosure Issues in Antidepressant Pediatric Clinical Trials: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 108th Cong. (2004).

151.Sept. 9, 2004; *G.I. Finances: Protecting Those Who Protect Us: Hearing Before the H. Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises of the H. Comm. on Financial Services*, 108th Cong. (2004).

152.Sept. 9, 2004; *Creating Secure Borders and Open Doors: A Review of DHS-State Collaboration on U.S. Visa Policy: Hearing Before the H. Comm. on Government Reform*, 108th Cong. (2004).

153.Sept. 9, 2004; *Potash Royalty Reduction Act: Hearing Before the H. Subcomm. on Energy and Mineral Resources of the H. Comm. on Resources*, 108th Cong. (2004).

154.Sept. 9, 2004; *Miscellaneous Measures: Hearing Before the H. Subcomm. on Water and Power of the H. Comm. on Resources*, 108th Cong. (2004).

155.Sept. 9, 2004; *Delay Reduction Efforts at Chicago's O'Hare International Airport: Hearing Before the H. Subcomm. on Aviation of the H. Comm. on Transportation and Infrastructure*, 108th Cong. (2004).

156.Sept. 9, 2004; *ABU Ghraib Prison Facility: Investigation of Military Intelligence Activities: Hearing Before the S. Comm. on Armed Services*, 108th Cong. (2004).

157.Sept. 9, 2004; *Department of Defense Detention Operations: Hearing Before the S. Comm. on Armed Services*, 108th Cong. (2004).

158.Sept. 9, 2004; *Examining the Impact of the Sarbanes-Oxley Act and Developments Concerning International Convergence: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. (2004).

159.Sept. 9, 2004; *Current Situation in Sudan and the Prospects for Peace: Hearing Before the S. Comm. on Armed Services*, 108th Cong. (2004).

160.Sept. 9, 2004; *Nominations: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2004) (reported favorably several federal judges).

161.Sept. 8, 2004; *Performance of U.S. Military Servicemembers in Iraq and Afghanistan: Hearing Before the H. Comm. on Armed Services*, 108th Cong. (2004).

162.Sept. 8, 2004; *Economic Outlook and Current Fiscal Issues: Hearing Before the H. Comm. on Budget*, 108th Cong. (2004).

163.Sept. 8, 2004; *Update of the Budget and Economic Outlook: Hearing Before the H. Comm. on Budget*, 108th Cong. (2004).

164.Sept. 8, 2004; *Law Enforcement Access to Communication Systems in a Digital Age: Hearing Before the H. Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 108th Cong. (2004).

165.Sept. 8, 2004; *Protecting our Financial Infrastructure: Preparation and Vigilance: Hearing Before the H. Comm. on Financial Services*, 108th Cong. (2004).

166.Sept. 8, 2004; *Truth Revealed: New Scientific Discoveries Regarding Mercury in Medicine and Autism: Hearing Before the H. Subcomm. on Human Rights and Wellness of the H. Comm. on Government Reform*, 108th Cong. (2004).

167.Sept. 8, 2004; *Assessing Sept. 11th Health Care Effects: Hearing Before the H. Subcomm. on National Security,*

Emerging Threats, and International Relations of the H. Comm. on Government Reform, 108th Cong. (2004).

168. Sept. 8, 2004; *Project SAFECOM: More Time: Hearing Before the H. Subcomm. on Technology, Information Policy, Intergovernmental Relations, and the Census of the H. Comm. on Government Reform*, 108th Cong. (2004).

169. Sept. 8, 2004; *NASA's Space Shuttle Program: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004).

170. Sept. 8, 2004; *9/11 Commission Recommendations: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004).

171. Sept. 8, 2004; *Intelligence Community Reforms: Hearing Before the S. Comm. on Governmental Affairs*, 108th Cong. (2004).

172. Sept. 8, 2004; *Nominations: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2004).

173. Sept. 7, 2004; *Intelligence Reform: Hearing Before the S. Select Comm. on Intelligence*, 108th Cong. (2004).

2006 COMMITTEE HEARINGS*

1. Oct. 4, 2006; *Ova-Pollution in the Potomac: Egg-Bearing Male Bass and Implications for Human and Ecological Health: Hearing Before the H. Comm. on Government Reform*, 109th Cong. (2006).

2. Sept. 29, 2006; *Internet Data Brokers and Pretexting: Who Has Access to Your Private Records?: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 109th Cong. (2006).

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*. The 2006 federal election occurred on November 7th. Sixty days prior to the Federal Election Day was September 8th. The following committee hearings took place during that time.

3. Sept. 29, 2006; *Falun Gong: Organ Harvesting and China's Ongoing War on Human Rights: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on International Relations*, 109th Cong. (2006).
4. Sept. 29, 2006; *NOAA Weather Satellite Program: Hearing Before the H. Comm. on Science*, 109th Cong. (2006).
5. Sept. 29, 2006; *Business Meeting of the S. Comm. on the Judiciary*, 109th Cong. (2006).
6. Sept. 28, 2006; *Voting Assistance Program: Hearing Before the S. Comm. on Armed Services*, 109th Cong. (2006).
7. Sept. 28, 2006; *Business Meeting of the S. Comm. on Committee on the Judiciary*, 109th Cong. (2006).
8. Sept. 28, 2006; *State of the Economy and Budget: Hearing Before the S. Comm. on Budget*, 109th Cong. (2006).
9. Sept. 28, 2006; *New Aircraft in National Airspace System: Hearing Before the S. Subcomm. on Aviation of the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. (2006).
10. Sept. 28, 2006; *Hazardous Waste Electronic Manifest System: Hearing Before the S. Subcomm. on Superfund and Waste Management of the S. Comm. on Environment and Public Works*, 109th Cong. (2006).
11. Sept. 28, 2006; *Public Debt: Hearing Before the S. Subcomm. on Long-term Growth and Debt Reduction of the S. Comm. on Finance*, 109th Cong. (2006).
12. Sept. 28, 2006; *Securing the National Capital Region: Hearing Before the S. Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia of the S. Comm. on Homeland Security and Governmental Affairs*, 109th Cong. (2006).
13. Sept. 28, 2006; *Intelligence Matters: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. (2006).

14. Sept. 28, 2006; *Review the EPA Pesticide Program: Hearing Before the H. Subcomm. on Conservation, Credit, Rural Development, and Research of the H. Comm. on Agriculture,* 109th Cong. (2006).

15. Sept. 28, 2006; *Examining Whether Combining Guards and Other Employees in Bargaining Units Would Weaken National Security: Hearing Before the H. Subcomm. on Employer-Employee Relations of the H. Comm. on Education and Workforce,* 109th Cong. (2006).

16. Sept. 28, 2006; *Hezbollah's Global Reach: Hearing Before the H. Subcomm. on International Terrorism and Nonproliferation and the H. Subcomm. on Middle East and Central Asia of the H. Comm. on International Relations,* 109th Cong. (2006).

17. Sept. 28, 2006; *Acquisition Under Duress: Reconstruction Contracting in Iraq: Hearing Before the H. Comm. on Government Reform,* 109th Cong. (2006).

18. Sept. 28, 2006; *Role of Faith-Based Organizations in U.S. Programming in Africa: Hearing Before the H. Subcomm. on Africa, Global Human Rights, and International Operations of the H. Comm. on International Relations,* 109th Cong. (2006).

19. Sept. 28, 2006; *Medicare Physician Payments: 2007 and Beyond: Hearing Before the H. Subcomm. on Health of the H. Comm. on Energy and Commerce,* 109th Cong. (2006).

20. Sept. 28, 2006; *Hewlett-Packard's Pretexting Scandal: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce,* 109th Cong. (2006).

21. Sept. 28, 2006; *Improving Financial Literacy: Working Together To Develop Private Sector Coordination and Solutions: Hearing Before the H. Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services,* 109th Cong. (2006).

22. Sept. 28, 2006; *Front-Line Defense: Security Training for Mass Transit and Rail Employees: Hearing Before the H. Subcomm. on Economic Security, Infrastructure Protection, and Cybersecurity of the H. Comm. on Homeland Security,* 109th Cong. (2006).
23. Sept. 28, 2006; *Electronic Voting Machines: Verification – Security, and Paper Trails: Hearing Before the H. Comm. on House Administration,* 109th Cong. (2006).
24. Sept. 28, 2006; *Moving Forward in Haiti: How the U.S. and the International Community Can Help: Hearing Before the H. Subcomm. on Western Hemisphere of the H. Comm. on International Relations,* 109th Cong. (2006).
25. Sept. 28, 2006; *Miscellaneous Measures: Hearing Before the H. Subcomm. on National Parks of the H. Comm. on Resources,* 109th Cong. (2006).
26. Sept. 28, 2006; *Implementing the Vision for Space Exploration: Development of the Crew Exploration Vehicle: Hearing Before the H. Comm. on Science,* 109th Cong. (2006).
27. Sept. 28, 2006; *New Hands on the Amtrak Throttle: Hearing Before the H. Subcomm. on Railroads of the H. Comm. on Transportation and Infrastructure,* 109th Cong. (2006).
28. Sept. 28, 2006; *Post Traumatic Stress Disorder and Traumatic Brain Injury: Emerging Trends in Force and Veteran Health: Hearing Before the H. Subcomm. on Health of the H. Comm. on Veterans' Affairs,* 109th Cong. (2006).
29. Sept. 27, 2006; *Montgomery G.I. Bill for Members of the Selected Reserve: Hearing Before the H. Subcomm. on Military Personnel of the H. Comm. on Armed Services and the H. Subcomm. on Economic Opportunity of the Committee on Veterans' Affairs,* 109th Cong. (2006).
30. Sept. 27, 2006; *Irregular Warfare Roadmap: Hearing Before the H. Subcomm. on Terrorism, Unconventional*

Threats, and Capabilities of the H. Comm. on Armed Services, 109th Cong. (2006).

31. Sept. 27, 2006; *Perspectives on Early Childhood Home Visitation Programs: Hearing Before the H. Subcomm. on Education Reform; ; H. Comm. on Education and Workforce,* 109th Cong. (2006).

32. Sept. 27, 2006; *Sexual Exploitation of Children Over the Internet: Follow-up Issues to the Masha Allen Adoption: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce,* 109th Cong. (2006).

33. Sept. 27, 2006; *Protecting Americans from Catastrophic Terrorism Risk: Hearing Before the H. Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises and the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services,* 109th Cong. (2006).

34. Sept. 27, 2006; *Rebalancing the Carbon Cycle: Hearing Before the H. Subcomm. on Energy and Resources of the H. Comm. on Government Reform,* 109th Cong. (2006).

35. Sept. 27, 2006; *Banks in Real Estate: A Review of the Office of the Comptroller of the Currency's December 2005 Rulings: Hearing Before the H. Subcomm. on Government Management, Finance, and Accountability of the H. Comm. on Government Reform,* 109th Cong. (2006).

36. Sept. 27, 2006; *IT Assessment: a Ten-Year Vision for Information Technology in the House: Hearing Before the H. Comm. on House Administration,* 109th Cong. (2006).

37. Sept. 27, 2006; *U.S.-Republic of Korea Relations: an Alliance at Risk?: Hearing Before the H. Comm. on International Relations,* 109th Cong. (2006).

38. Sept. 27, 2006; *Advancing Security and Commerce at Our Nation's Ports: the Goals Are Not Mutually Exclusive: Hearing Before the H. Comm. on Small Business,* 109th Cong. (2006).

39. Sept. 27, 2006; *Next Generation Air Transportation System Financing Options: Hearing Before the H. Subcomm. on Aviation of the H. Comm. on Transportation and Infrastructure,* 109th Cong. (2006).
40. Sept. 27, 2006; *Administration of the VA Pension Program: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs,* 109th Cong. (2006).
41. Sept. 27, 2006; *DNI's Perspective on State of Intelligence Reform: Hearing Before the H. Permanent Select Comm. on Intelligence,* 109th Cong. (2006).
42. Sept. 27, 2006; *Riot Control Agents: Hearing Before the S. Subcomm. on Readiness and Management Support of the S. Comm. on Armed Services,* 109th Cong. (2006).
43. Sept. 27, 2006; *Nominations: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs,* 109th Cong. (2006).
44. Sept. 27, 2006; *Lands Legislation: Hearing Before the S. Subcomm. on Public Lands and Forests of the S. Comm. on Energy and Natural Resources,* 109th Cong. (2006).
45. Sept. 27, 2006; *Nominations: Hearing Before the S. Comm. on Foreign Relations,* 109th Cong. (2006).
46. Sept. 27, 2006; *Emergency Medical Care: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions,* 109th Cong. (2006).
47. Sept. 27, 2006; *Diabetes Care and Technologies: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs,* 109th Cong. (2006).
48. Sept. 27, 2006; *United States Refugee Admissions and Policy: Hearing Before the S. Subcomm. on Immigration, Border Security, and Citizenship of the S. Comm. on the Judiciary,* 109th Cong. (2006).

49. Sept. 26, 2006; *Federal Farm Policy: Hearing Before the H. Subcomm. on Livestock and Horticulture of the H. Comm. on Agriculture,* 109th Cong. (2006).

50. Sept. 26, 2006; *Alternative Energy and Energy Efficiency Programs of the Department of Defense: Hearing Before the H. Subcomm. on Terrorism, Unconventional Threats, and Capabilities and the H. Subcomm. on Readiness of the H. Comm. on Armed Services,* 109th Cong. (2006).

51. Sept. 26, 2006; *Internet and the College Campus: How the Entertainment Industry and Higher Education Are Working To Combat Illegal Piracy: Hearing Before the H. Subcomm. on 21st Century Competitiveness of the H. Comm. on Education and Workforce,* 109th Cong. (2006).

52. Sept. 26, 2006; *Editing Hollywood's Editors: Cleaning Flicks for Families: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce,* 109th Cong. (2006).

53. Sept. 26, 2006; *Sexual Exploitation of Children Over the Internet: the Face of a Child Predator and Other Issues: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce,* 109th Cong. (2006).

54. Sept. 26, 2006; *Medical Device Safety: How FDA Regulates the Reprocessing of Supposedly Single-Use Devices: Hearing Before the H. Comm. on Government Reform,* 109th Cong. (2006).

55. Sept. 26, 2006; *Weapons of Mass Destruction: Reviving Disarmament: Hearing Before the H. Subcomm. on National Security, Emerging Threats, and International Relations of the H. Comm. on Government Reform,* 109th Cong. (2006).

56. Sept. 26, 2006; *H.R. 5242, Small Business Paperwork Amnesty Act: Hearing Before the H. Subcomm. on Regulatory*

Affairs of the H. Comm. on Government Reform, 109th Cong. (2006).

57. Sept. 26, 2006; *Department of Homeland Security: Major Initiatives for 2007 and Beyond: Hearing Before the H. Comm. on Homeland Security,* 109th Cong. (2006).

58. Sept. 26, 2006; *Enhancing the Global Fight to End Human Trafficking: Hearing Before the H. Comm. on International Relations,* 109th Cong. (2006).

59. Sept. 26, 2006; *Legal Services Corporation Improvement Act: Hearing Before the H. Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 109th Cong. (2006).

60. Sept. 26, 2006; *Miscellaneous Measures: Hearing Before the H. Subcomm. on Water and Power of the H. Comm. on Resources,* 109th Cong. (2006).

61. Sept. 26, 2006; *National Academy of Sciences' Decadal Plan for Aeronautics: a Blueprint for NASA?: Hearing Before the H. Subcomm. on Space and Aeronautics of the H. Comm. on Science,* 109th Cong. (2006).

62. Sept. 26, 2006; *National Academy of Sciences Icebreaker Report: Hearing Before the H. Subcomm. on Coast Guard and Maritime Transportation of the H. Comm. on Transportation and Infrastructure,* 109th Cong. (2006).

63. Sept. 26, 2006; *Member Proposals on Tax Issues Introduced in the 109th Congress: Hearing Before the H. Subcomm. on Select Revenue Measures of the H. Comm. on Ways and Means,* 109th Cong. (2006).

64. Sept. 26, 2006; *DNI's Intelligence Collection Architecture: Hearing Before the H. Permanent Select Comm. on Intelligence.* 109th Cong. (2006).

65. Sept. 26, 2006; *New Basel Capital Accord: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs,* 109th Cong. (2006).

66. Sept. 26, 2006; *International Polar Year: Hearing Before the S. Comm. on Commerce, Science, and Transportation and the S. Comm. on Foreign Relations,* 109th Cong. (2006).
67. Sept. 26, 2006; *Health Savings Accounts: Hearing Before the S. Subcomm. on Health Care of the S. Comm. on Finance,* 109th Cong. (2006).
68. Sept. 26, 2006; *Global Child Hunger: Hearing Before the S. Comm. on Foreign Relations,* 109th Cong. (2006).
69. Sept. 26, 2006; *Federal Executives Pay for Performance: Hearing Before the S. Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia of the S. Comm. on Homeland Security and Governmental Affairs,* 109th Cong. (2006).
70. Sept. 26, 2006; *Uncollected Taxes and Tax Code Transparency: Hearing Before the S. Subcomm. on Federal Financial Management, Government Information, and International Security of the S. Comm. on Homeland Security and Governmental Affairs,* 109th Cong. (2006).
71. Sept. 26, 2006; *Illegal Insider Trading: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. (2006).
72. Sept. 26, 2006; *Nominations: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. (2006) (favorable report on Federal Judges).
73. Sept. 26, 2006; *Nominations: Hearing Before the S. Comm. on Veterans' Affairs,* 109th Cong. (2006).
74. Sept. 25, 2006; *Habeas Corpus Review for Guantanamo Detainees: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. (2006).
75. Sept. 22, 2006; *CSI Washington: Does the District Need Its Own Crime Lab?. Hearing Before the H. Comm. on Government Reform,* 109th Cong. (2006).

76. Sept. 22, 2006; *Nomination of Clyde Bishop: Hearing Before the S. Comm. on Foreign Relations,* 109th Cong. (2006).

77. Sept. 21, 2006; *Federal Farm Policy: Hearing Before the H. Subcomm. on General Farm Commodities and Risk Management of the H. Comm. on Agriculture,* 109th Cong. (2006).

78. Sept. 21, 2006; *Combat Vehicle Active Protection Systems: Hearing Before the H. Subcomm. on Tactical Air and Land Forces of the H. Comm. on Armed Services,* 109th Cong. (2006).

79. Sept. 21, 2006; *No Child Left Behind: How Can We Increase Parental Awareness of Supplemental Education Services?: Hearing Before the H. Comm. on Education and Workforce,* 109th Cong. (2006).

80. Sept. 21, 2006; *Deleting Commercial Child Pornography Sites from the Internet: the U.S. Financial Industry's Efforts To Combat This Problem: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce,* 109th Cong. (2006).

81. Sept. 21, 2006; *ICANN Internet Governance: Is It Working?: Hearing Before the H. Subcomm. on Telecommunications and the Internet and the H. Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce,* 109th Cong. (2006).

82. Sept. 21, 2006; *Climate Change Technology Research: Do We Need a "Manhattan Project" for the Environment?: Hearing Before the H. Comm. on Government Reform,* 109th Cong. (2006).

83. Sept. 21, 2006; *Police as First Preventers: Local Strategies in the War on Terror: Hearing Before the H. Subcomm. on Prevention of Nuclear and Biological Attack of the H. Comm. on Homeland Security,* 109th Cong. (2006).

84. Sept. 21, 2006; *America and Asia in a Changing World: Hearing Before the H. Subcomm. on Asia and the Pacific of the H. Comm. on International Relations,* 109th Cong. (2006).
85. Sept. 21, 2006; *Impeachment of Judge Manuel L. Real: Hearing Before the H. Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary,* 109th Cong. (2006).
86. Sept. 21, 2006; *Need for European Assistance to Colombia for the Fight Against Illicit Drugs: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary and the H. Subcomm. on Western Hemisphere of the H. Comm. on International Relations,* 109th Cong. (2006).
87. Sept. 21, 2006; *Migratory Waterfowl Conservation: Hearing Before the H. Subcomm. on Fisheries and Oceans of the H. Comm. on Resources,* 109th Cong. (2006).
88. Sept. 21, 2006; *Oversight: San Joaquin River Restoration Settlement Act: Hearing Before the H. Subcomm. on Water and Power of the H. Comm. on Resources,* 109th Cong. (2006).
89. Sept. 21, 2006; *Research on Environmental and Safety Impacts of Nanotechnology: What Are the Federal Agencies Doing?: Hearing Before the H. Comm. on Science,* 109th Cong. (2006).
90. Sept. 21, 2006; *Veterans Fiscal Year Review: Hearing Before the H. Comm. on Veterans' Affairs,* 109th Cong. (2006).
91. Sept. 21, 2006; *DOD HUMINT Way Ahead: Hearing Before the H. Subcomm. on Terrorism, Human Intelligence, Analysis, and Counterintelligence of the H. Permanent Select Comm. on Intelligence,* 109th Cong. (2006).
92. Sept. 21, 2006; *Capitol Visitor Center: Hearing Before the S. Subcomm. on Legislative Branch of the S. Comm. on Appropriations,* 109th Cong. (2006).

93. Sept. 21, 2006; *Nominations: Hearing Before the S. Comm. on Commerce, Science, and Transportation,* 109th Cong. (2006).

94. Sept. 21, 2006; *Nomination of Mary Bomar: Hearing Before the S. Comm. on Energy and Natural Resources,* 109th Cong. (2006).

95. Sept. 21, 2006; *Miscellaneous Measures: Hearing Before the S. Subcomm. on Water and Power of the S. Comm. on Energy and Natural Resources,* 109th Cong. (2006).

96. Sept. 21, 2006; *Nominations: Hearing Before the S. Comm. on Finance,* 109th Cong. (2006).

97. Sept. 21, 2006; *Afghanistan: Transition to NATO Command: Hearing Before the S. Comm. on Foreign Relations,* 109th Cong. (2006).

98. Sept. 21, 2006; *Nominations: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. (2006) (favorably reported federal judges).

99. Sept. 21, 2006; *Prisoner Rehabilitation: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. (2006).

100. Sept. 21, 2006; *Intelligence Matters: Hearing Before the S. Select Comm. on Intelligence,* 109th Cong. (2006).

101. Sept. 21, 2006; *Generic Drug Use and Prescription Costs: Hearing Before the S. Spec. Comm. on Aging,* 109th Cong. (2006).

102. Sept. 20, 2006; *Federal Farm Policy: Hearing Before the H. Comm. on Agriculture,* 109th Cong. (2006).

103. Sept. 20, 2006; *Improving Transparency in State Regulation of Insurer Investments: Hearing Before the H. Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises of the H. Comm. on Financial Services,* 109th Cong. (2006).

104. Sept. 20, 2006; *Next Generation Nuclear Plant and Hydrogen Production: a Critical Status Report: Hearing*

Before the H. Subcomm. on Energy and Resources of the H. Comm. on Government Reform, 109th Cong. (2006).

105.Sept. 20, 2006; *Executive and Judicial Compensation in the Federal Government (Quadrennial Commission): Hearing Before the H. Subcomm. on Federal Workforce and Agency Organization of the H. Comm. on Government Reform,* 109th Cong. (2006).

106.Sept. 20, 2006; *Historic Preservation and Community Development: Why Cities and Towns Should Look to the Past as the Key to Their Future: Hearing Before the H. Subcomm. on Federalism and the Census of the H. Comm. on Government Reform,* 109th Cong. (2006).

107.Sept. 20, 2006; *Homeland Security Implications of Radicalization: Hearing Before the H. Subcomm. on Intelligence, Information Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Security,* 109th Cong. (2006).

108.Sept. 20, 2006; *Afghanistan: Five Years After 9/11, Part I: Hearing Before the H. Comm. on International Relations,* 109th Cong. (2006).

109.Sept. 20, 2006; *Deteriorating Peace in Sudan: Hearing Before the H. Subcomm. on Africa, Global Human Rights, and International Operations of the H. Comm. on International Relations,* 109th Cong. (2006).

110.Sept. 20, 2006; *Serbia: Current Issues and Future Direction: Hearing Before the H. Subcomm. on Europe and Emerging Threats of the H. Comm. on International Relations,* 109th Cong. (2006).

111.Sept. 20, 2006; *Mineral Commodity Information Administration: Hearing Before the H. Subcomm. on Energy and Mineral Resources of the H. Comm. on Resources,* 109th Cong. (2006).

112.Sept. 20, 2006; *Climate Change Technology Programs: Hearing Before the H. Subcomm. on Energy of the H. Comm. on Science,* 109th Cong. (2006).

113.Sept. 20, 2006; *International Polar Year: the Scientific Agenda and Federal Role: Hearing Before the H. Subcomm. on Research of the H. Comm. on Science,* 109th Cong. (2006).

114.Sept. 20, 2006; *Oversight of Federal Aviation Administration Safety Programs: Hearing Before the H. Subcomm. on Aviation of the H. Comm. on Transportation and Infrastructure,* 109th Cong. (2006).

115.Sept. 20, 2006; *Veterans Fiscal Year Review: Hearing Before the H. Comm. on Veterans' Affairs,* 109th Cong. (2006).

116.Sept. 20, 2006; *Non-Traditional Mortgage Products: Hearing Before the S. Subcomm. on Housing and Transportation and the S. Subcomm. on Economic Policy of the S. Comm. on Banking, Housing, and Urban Affairs,* 109th Cong. (2006).

117.Sept. 20, 2006; *Internet Governance: Hearing Before the S. Subcomm. on Trade, Tourism, and Economic Development of the S. Comm. on Commerce, Science, and Transportation,* 109th Cong. (2006).

118.Sept. 20, 2006; *Nomination of Mary Peters: Hearing Before the S. Comm. on Commerce, Science, and Transportation,* 109th Cong. (2006).

119.Sept. 20, 2006; *Asia-Pacific Partnership on Clean Development and Climate: Hearing Before the S. Comm. on Environment and Public Works,* 109th Cong. (2006).

120.Sept. 20, 2006; *Business Tax Reform: Hearing Before the S. Comm. on Finance,* 109th Cong. (2006).

121.Sept. 20, 2006; *Nomination of Donald Yamamoto: Hearing Before the S. Comm. on Foreign Relations,* 109th Cong. (2006).

122.Sept. 20, 2006; *National Security Personnel System: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs,* 109th Cong. (2006).
123.Sept. 20, 2006; *Tribal Self-Governance: Hearing Before the S. Comm. on Indian Affairs,* 109th Cong. (2006).
124.Sept. 20, 2006; *Reporters' Privilege Legislation: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. (2006).
125.Sept. 20, 2006; *Restructuring of the Ninth Circuit Court of Appeals: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. (2006).
126.Sept. 20, 2006; *American Legion: Hearing Before the S. Comm. on Veterans' Affairs,* 109th Cong. (2006).
127.Sept. 19, 2006; *Improving NIH Management and Operation: a Legislative Hearing on the NIH Reform Act of 2006: Hearing Before the H. Comm. on Energy and Commerce,* 109th Cong. (2006).
128.Sept. 19, 2006; *Sarbanes-Oxley at Four: Protecting Investors and Strengthening the Markets: Hearing Before the H. Comm. on Financial Services,* 109th Cong. (2006).
129.Sept. 19, 2006; *Combating Terrorism: Lessons Learned from London: Hearing Before the H. Subcomm. on National Security, Emerging Threats, and International Relations of the H. Comm. on Government Reform,* 109th Cong. (2006).
130.Sept. 19, 2006; *Nonadmitted and Reinsurance Reform Act of 2006: Hearing Before the H. Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 109th Cong. (2006).
131.Sept. 19, 2006; *Nominations: Hearing Before the S. Comm. on Armed Services,* 109th Cong. (2006).
132.Sept. 19, 2006; *Combating Child Pornography: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs,* 109th Cong. (2006).

133.Sept. 19, 2006; *Online Child Pornography: Hearing Before the S. Comm. on Commerce, Science, and Transportation,* 109th Cong. (2006).
134.Sept. 19, 2006; *Iran's Nuclear Ambitions and U.S. Policy: Hearing Before the S. Comm. on Foreign Relations,* 109th Cong. (2006).
135.Sept. 19, 2006; *Prison Radicalization: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs,* 109th Cong. (2006).
136.Sept. 19, 2006; *Cost of Crime: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. (2006).
137.Sept. 19, 2006; *Nominations: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. (2006) (regarding federal judges).
138.Sept. 18, 2006; *Review of Federal Farm Policy: Hearing Before the H. Comm. on Agriculture,* 109th Cong. (2006).
139.Sept. 16, 2006; *Review of Federal Farm Policy: Hearing Before the H. Comm. on Agriculture,* 109th Cong. (2006).
140.Sept. 15, 2006; *Contact Lens Sales: Is Market Regulation the Prescription?: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Government Reform,* 109th Cong. (2006).
141.Sept. 15, 2006; *Iraq: Democracy or Civil War?: Hearing Before the H. Subcomm. on National Security, Emerging Threats, and International Relations of the H. Comm. on Government Reform,* 109th Cong. (2006).
142.Sept. 14 and 21, 2006; *Review of Federal Farm Policy: Hearing Before the H. Subcomm. on Science, the Departments of State, Justice and Commerce, and Related Agencies of the H. Comm. on Agriculture,* 109th Cong. (2006).
143.Sept. 14 and 21, 2006; *FBI Transformation: Hearing Before the H. Subcomm. on Science, the Departments of State,*

Justice and Commerce, and Related Agencies of the H. Comm. on Appropriations, 109th Cong. (2006).

144.Sept. 14, 2006; *A Review of Regulatory Proposals on Basel Capital and Commercial Real Estate: Hearing Before the H. Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services,* 109th Cong. (2006).

145.Sept. 14, 2006; *Part Two: Interior Department: A Culture of Management Irresponsibility and Lack of Accountability?: Hearing Before the H. Comm. on Government Reform,* 109th Cong. (2006).

146.Sept. 14, 2006; *Science of Prevention: Hearing Before the H. Subcomm. on Prevention of Nuclear and Biological Attack of the H. Comm. on Homeland Security,* 109th Cong. (2006).

147.Sept. 14, 2006; *Japan's Relations with Its Neighbors: Back to the Future?: Hearing Before the H. Comm. on International Relations,* 109th Cong. (2006).

148.Sept. 14, 2006; *Is There a Clash of Civilizations? Islam, Democracy, and U.S.-Middle East and Central Asia Policy: Hearing Before the H. Subcomm. on Middle East and Central Asia of the H. Comm. on International Relations,* 109th Cong. (2006).

149.Sept. 14, 2006; *D.C. Fair and Equal House Voting Rights Act: Hearing Before the H. Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. (2006).

150.Sept. 14, 2006; *Bill To Amend Title 35, U.S. Code, To Conform Certain Filing Provisions Within the Patent and Trademark Office: Hearing Before the H. Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary,* 109th Cong. (2006).

151.Sept. 14, 2006; *Miscellaneous Measures: Hearing Before the H. Subcomm. on Fisheries and Oceans of the H. Comm. on Resources,* 109th Cong. (2006).

152.Sept. 14, 2006; *Miscellaneous Measures: Hearing Before the H. Subcomm. on Forests and Forest Health of the H. Comm. on Resources,* 109th Cong. (2006).

153.Sept. 14, 2006; *Review of Coast Guard Mission Performance: Hearing Before the H. Subcomm. on Coast Guard and Maritime Transportation of the H. Comm. on Transportation and Infrastructure,* 109th Cong. (2006).

154.Sept. 14, 2006; *Overview of the Global Nuclear Energy Partnership (GNEP), Including Proposed Advanced Reactor Technologies for Recycling Nuclear Waste: Hearing Before the S. Subcomm. on Energy and Water of the S. Comm. on Appropriations,* 109th Cong. (2006).

155.Sept. 14, 2006; *Catching Terrorists: The British System Versus the U.S. System: Hearing Before the S. Subcomm. on Homeland Security of the S. Comm. on Appropriations,* 109th Cong. (2006).

156.Sept. 14, 2006; *Predatory Lending Practices: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs,* 109th Cong. (2006).

157.Sept. 14, 2006; *Rural Air Service: Hearing Before the S. Subcomm. on Aviation; ; S. Comm. on Commerce, Science, and Transportation,* 109th Cong. (2006).

158.Sept. 14, 2006; *Nominations: Hearing Before the S. Comm. on Energy and Natural Resources,* 109th Cong. (2006).

159.Sept. 14, 2006; *Nuclear Regulatory Commission: Hearing Before the S. Subcomm. on Clean Air, Climate Change, and Nuclear Safety of the S. Comm. on Environment and Public Works,* 109th Cong. (2006).

160.Sept. 14, 2006; *Federal Agencies Conference Spending: Hearing Before the S. Subcomm. on Federal Financial Management, Government Information, and International Security of the S. Comm. on Homeland Security and Governmental Affairs,* 109th Cong. (2006).

161.Sept. 14, 2006; *Immigration Employment Skills-Based Point System: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions,* 109th Cong. (2006).
162.Sept. 14, 2006; *Nomination of Carl J. Artman: Hearing Before the S. Comm. on Indian Affairs,* 109th Cong. (2006).
163.Sept. 14, 2006; *Suicide Among Seniors: Hearing Before the S. Spec. Comm. on Aging,* 109th Cong. (2006).
164.Sept. 13, 2006; *Federal Farm Policy: Hearing Before the H. Comm. on Agriculture,* 109th Cong. (2006).
165.Sept. 13, 2006; *Oversight of Nuclear Energy: Hearing Before the H. Subcomm. on Energy and Water Development of the H. Comm. on Agriculture,* 109th Cong. (2006).
166.Sept. 13, 2006; *How Budgetary Choices Affect Work – Saving, and Growth: The Real Purpose of Dynamic Estimating: Hearing Before the H. Comm. on Budget,* 109th Cong. (2006).
167.Sept. 13, 2006; *Nuclear Waste and Hydroelectric Energy Efficiency Legislation: Hearing Before the H. Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce,* 109th Cong. (2006).
168.Sept. 13, 2006; *Continuing Ethics and Management Concerns at NIH and the Public health Service Commission and Corps: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce,* 109th Cong. (2006).
169.Sept. 13, 2006; *CyberSecurity: Protecting America's Critical Infrastructure, Economy, and Consumers: Hearing Before the H. Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce,* 109th Cong. (2006).
170.Sept. 13, 2006; *Stabilizing Insurance markets for Coastal Consumers: Hearing Before the H. Subcomm. on Capital*

Markets, Insurance, and Government Sponsored Enterprises of the H. Comm. on Financial Services, 109th Cong. (2006).

171.Sept. 13, 2006; *Interior Department: A Culture of Managerial Irresponsibility and Lack of Accountability?: Hearing Before the H. Subcomm. on Energy and Resources of the H. Comm. on Government Reform,* 109th Cong. (2006).

172.Sept. 13, 2006; *DHS Financial Management: Evaluating Progress in Improving Internal Controls: Hearing Before the H. Subcomm. on Government Management, Finance, and Accountability of the H. Comm. on Government Reform,* 109th Cong. (2006).

173.Sept. 13, 2006; *Iraq: Democracy or Civil War?: Hearing Before the H. Subcomm. on National Security, Emerging Threats, and International Relations of the H. Comm. on Government Reform,* 109th Cong. (2006).

174.Sept. 13, 2006; *The Future of Cyber and Telecommunications Security at the Department of Homeland Security: Hearing Before the H. Subcomm. on Economic Security, Infrastructure Protection, and Cybersecurity of the H. Comm. on Homeland Security,* 109th Cong. (2006).

175.Sept. 13, 2006; *Homeland Security Information Network: an Update on DHS Information Sharing Efforts: Hearing Before the H. Subcomm. on Intelligence, Information Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Security,* 109th Cong. (2006).

176.Sept. 13, 2006; *Helping Business Protect the Homeland: Is the Department of Homeland Security Effectively Implementing the SAFETY Act?: Hearing Before the H. Subcomm. on Management, Integration, and Oversight and the H. Subcomm. on Emergency Preparedness, Science, and Technology of the H. Comm. on Resources,* 109th Cong. (2006).

177.Sept. 13, 2006; *The Americans With Disabilities Act: Sixteen Years Later: Hearing Before the H. Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. (2006).

178.Sept. 13, 2006; *Miscellaneous Measures: Hearing Before the H. Comm. on Resources,* 109th Cong. (2006).

179.Sept. 13, 2006; *Visitation Trends in the Nation Park System, Part II: Hearing Before the H. Subcomm. on National Parks of the H. Comm. on Resources,* 109th Cong. (2006).

180.Sept. 13, 2006; *How Can Technologies Help Secure Our Borders?: Hearing Before the H. Comm. on Science,* 109th Cong. (2006).

181.Sept. 13, 2006; *Low Pressure Liquid Pipelines: Hearing Before the H. Comm. on Transportation and Infrastructure,* 109th Cong. (2006).

182.Sept. 13, 2006; *Great Lakes Restoration and Protection: Hearing Before the H. Subcomm. on Water Resources and Environment of the H. Comm. on Transportation and Infrastructure,* 109th Cong. (2006).

183.Sept. 13, 2006; *Oversight of Veterans Benefits Claims Adjudicators: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs,* 109th Cong. (2006).

184.Sept. 13, 2006; *National Strategy for Combating Terrorism: Hearing Before the H. Subcomm. on Terrorism, Human Intelligence, Analysis, and Counterintelligence of the H. Permanent Select Comm. on Intelligence,* 109th Cong. (2006).

185.Sept. 13, 2006; *Various Bills and Resolutions: Hearing Before the H. Comm. on International Relations,* 109th Cong. (2006).

186.Sept. 13, 2006; *Housing Bubble: Hearing Before the S. Subcomm. on Economic Policy and the S. Subcomm. on*

Housing and Transportation of the S. Comm. on Banking, Housing, and Urban Affairs, 109th Cong. (2006).

187.Sept. 13, 2006; *Nominations: Hearing Before the S. Comm. on Environment and Public Works,* 109th Cong. (2006).

188.Sept. 13, 2006; *Hospital Charitable Care and Community Benefits: Hearing Before the S. Comm. on Finance,* 109th Cong. (2006).

189.Sept. 13, 2006; *Lebanon: Securing a Permanent Cease-Fire: Hearing Before the S. Comm. on Foreign Relations,* 109th Cong. (2006).

190.Sept. 13, 2006; *Nominations: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs,* 109th Cong. (2006).

191.Sept. 13, 2006; *Medicaid: Managed Care: Hearing Before the S. Spec. Comm. on Aging,* 109th Cong. (2006).

192.Sept. 13, 2006; *Challenges Facing Federal Prosecutors: Hearing Before the S. Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary,* 109th Cong. (2006).

193.Sept. 12, 2006; *Foreign Operations, Export Financing, and Related Programs Appropriations for 2007 Part 4: Afghanistan Interdiction/Eradication of Illegal Narcotics and U.S. Led Rebuilding Programs: Hearing Before the H. Subcomm. on Foreign Operations, Export Financing, and Related Programs of the H. Comm. on Appropriations,* 109th Cong. (2006).

194.Sept. 12, 2006; *International Fund for Agricultural Development (IFAD) and the Importance of Agricultural Development in Sustainable Global Poverty Reduction: Hearing Before the H. Subcomm. on Domestic and International Monetary Policy, Trade, and Technology of the H. Comm. on Financial Services,* 109th Cong. (2006).

195.Sept. 12, 2006; *Electronic Surveillance Modernization Act: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary,* 109th Cong. (2006).

196.Sept. 12, 2006; *Treasury Role in Combating Terrorist Financing: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs,* 109th Cong. (2006).

197.Sept. 12, 2006; *Nominations: Hearing Before the S. Comm. on Commerce, Science, and Transportation,* 109th Cong. (2006).

198.Sept. 12, 2006; *BP Pipeline Failure: Hearing Before the S. Comm. on Energy and Natural Resources,* 109th Cong. (2006).

199.Sept. 12, 2006; *Methamphetamine Supply Chain: Hearing Before the S. Comm. on Finance,* 109th Cong. (2006).

200.Sept. 12, 2006; *Nomination of James Kunder: Hearing Before the S. Comm. on Foreign Relations,* 109th Cong. (2006).

201.Sept. 12, 2006; *Homeland Security Next Five Years: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs,* 109th Cong. (2006).

202.Sept. 12, 2006; *Thompson Memorandum: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. (2006).

203.Sept. 12, 2006; *Nominations: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. (2006) (regarding federal district judges).

204.Sept. 11, 2006; *Iraq: Democracy or Civil War?: Hearing Before the H. Subcomm. on National Security, Emerging Threats, and International Relations of the H. Comm. on Government Reform,* 109th Cong. (2006).

205.Sept. 11, 2006; *U.S., Canada, and Mexico Trade Relations Under NAFTA: Hearing Before the S. Subcomm. on*

International Trade of the S. Comm. on Finance, 109th Cong. (2006).

206. Sept. 8, 2006; *Regional Farm Bill Field for Lubbock, Texas: Hearing Before the S. Comm. on Agriculture, Nutrition, and Forestry,* 109th Cong. (2006).

Appendix D

COMMITTEE REPORTS OF THE HOUSE OF REPRESENTATIVES AND THE SENATE ISSUED DURING THE SIXTY DAY PERIOD PRIOR TO GENERAL ELECTIONS 2004 AND 2006

2004 COMMITTEE REPORTS*

1. Oct. 11, 2004; S. Rep. No. 108-398 (2004). Senate Committee on Appropriations; Report: Further Revised Allocation to Subcommittees of Budget Totals for FY2005.**
2. Oct. 11, 2004; S. Rep. No. 108-399 (2004). Senate Committee on Commerce, Science, and Transportation; Report: Training for Realtime Writers Act of 2003.
3. Oct. 11, 2004; S. Rep. No. 108-400 (2004). Senate Committee on Commerce, Science, and Transportation; Report: National Ocean Exploration Program Act.
4. Oct. 11, 2004; S. Rep. No. 108-401 (2004). Senate Committee on Commerce, Science, and Transportation; Report: Marine Debris Research and Reduction Act.
5. Oct. 11, 2004; S. Rep. No. 108-402 (2004). Senate Committee on Commerce, Science, and Transportation; Report: Ocean and Coastal Mapping Integration Act.
6. Oct. 9, 2004; H.R. Rep. No. 108-773 (2004). House Committee on Appropriations; Report: Making Appropriations for Military Construction, Family Housing, and Base

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*. The 2004 federal election occurred on November 2nd. Sixty days prior to the Federal Election Day was September 3rd. The following Committee reports, listed here in reverse chronological order, were issued by Senate and House Committees during that time.

**. The Committee Reports are referenced by the date, the Committee Report Citation, the Committee, and the topic of the Report.

Realignment and Closure for the Department of Defense for the Fiscal Year Ending Sept. 30, 2005.

7. Oct. 9, 2004; H.R. Rep. No. 108-774 (2004). House Committee on Appropriations; Report: Making Appropriations for the Department of Homeland Security for the Fiscal Year Ending Sept. 30, 2005.

8. Oct. 8, 2004; H.R. Rep. No. 108-767 (2004). House Committee on Armed Services; Report: Ronald W. Reagan National Defense Authorization Act for FY2005.

9. Oct. 8, 2004; H.R. Rep. No. 108-754, pt. 2 (2004). House Committee on Energy and Commerce; Report: Requesting the President and Directing the Secretary of Health and Human Services Provide Certain Documents to the House of Representatives Relating to Estimates and Analyses of the Cost of the Medicare Prescription Drug Legislation.

10. Oct. 8, 2004; H.R. Rep. No. 108-770 (2004). House Committee on Energy and Commerce; Report: National Uniformity for Food Act of 2004.

11. Oct. 8, 2004; H.R. Rep. No. 108-768 (2004). House Committee on Government Reform; Report: Program Assessment and Results Act.

12. Oct. 8, 2004; H.R. Rep. No. 108-764 (2004). House Committee on Rules; Report: Waiving a Requirement of Clause 6(a) of Rule XIII with Respect to the Same Day Consideration of Certain Resolutions Reported by the Rules Committee.

13. Oct. 8, 2004; H.R. Rep. No. 108-765 (2004). House Committee on Rules; Report: Providing for Consideration of Motions To Suspend the Rules.

14. Oct. 8, 2004; H.R. Rep. No. 108-766 (2004). House Committee on Rules; Report: Waiving a Requirement of Clause 6(a) of Rule XIII with Respect to the Same Day

Consideration of Certain Resolutions Reported by the Rules Committee.

15. Oct. 8, 2004; H.R. Rep. No. 108-769 (2004). House Committee on Rules; Report: Waiving Points of Order Against the Conference Report To Accompany H.R. 4200, National Defense Authorization Act for FY 2005.

16. Oct. 8, 2004; H.R. Rep. No. 108-772 (2004). House Committee on Rules; Report: Waiving Requirement of Clause 6(a) of Rule XIII with Respect to the Same Day Consideration of Certain Resolutions Reported by the Rules Committee.

17. Oct. 8, 2004; H.R. Rep. No. 108-771 (2004). House Committee on Ways and Means; Report: Miscellaneous Trade and Technical Corrections Act of 2004.

18. Oct. 8, 2004; S. Rep. No. 108-396 (2004). Senate Committee on Commerce, Science, and Transportation; Report: Public Broadcasting Reauthorization Act of 2004.

19. Oct. 8, 2004; S. Rep. No. 108-392 (2004). Senate Committee on Governmental Affairs; Report: Federal Employee Protection of Disclosures Act.

20. Oct. 8, 2004; S. Rep. No. 108-393 (2004). Senate Committee on Governmental Affairs; Report: Federal Employee Dental and Vision Benefits Enhancement Act of 2004.

21. Oct. 8, 2004; S. Rep. No. 108-397 (2004). Senate Committee on Indian Affairs; Report: Providing for Equitable Compensation to the Spokane Tribe of Indians of the Spokane Reservation for the Use of Tribal Land for the Production of Hydropower by the Grand Coulee Dam.

22. Oct. 8, 2004; S. Rep. No. 108-394 (2004). Senate Committee on Health, Education, Labor, and Pensions; Report: Asthmatic Schoolchildren's Treatment and Health Management Act of 2004.

23. Oct. 8, 2004; S. Rep. No. 108-395 (2004). Senate Committee on Health, Education, Labor, and Pensions; Report: Keeping Seniors Safe from Falls Act of 2004.
24. Oct. 7, 2004; H.R. Rep. No. 108-756 (2004). House Committee on the Judiciary; Report: Animal Fighting Prohibition Enforcement Act of 2004.
25. Oct. 7, 2004; H.R. Rep. No. 108-757 (2004). House Committee on Resources; Report: Additional Authorization of Appropriations for the Reclamation Safety of Dams Act of 1978.
26. Oct. 7, 2004; H.R. Rep. No. 108-758 (2004). House Committee on Resources; Report: Lower Rio Grande Valley Water Resources Conservation and Improvement Act of 2004.
27. Oct. 7, 2004; H.R. Rep. No. 108-759 (2004). House Committee on Resources; Report: Wichita Project Equus Beds Division Authorization Act of 2004.
28. Oct. 7, 2004; H.R. Rep. No. 108-760 (2004). House Committee on Resources; Report: Amending the Reclamation Wastewater and Groundwater Study and Facilities Act To Authorize the Secretary of the Interior To Participate in the El Paso – Texas, Water Reclamation – Reuse, and Desalinization Project.
29. Oct. 7, 2004; H.R. Rep. No. 108-761 (2004). House Committee on Resources; Report: Northern Mariana Islands Delegate Act.
30. Oct. 7, 2004; H.R. Rep. No. 108-751 (2004). House Committee on Rules; Report: Providing for Consideration of H.R. 10, 9/11 Recommendations Implementation Act.
31. Oct. 7, 2004; H.R. Rep. No. 108-752 (2004). House Committee on Rules; Report: Waiving Requirement of Clause 6(a) of Rule XIII with Respect to the Same Day Consideration of Certain Resolutions Reported by the Rules Committee.

32. Oct. 7, 2004; H.R. Rep. No. 108-753 (2004). House Committee on Rules; Report: Providing for Consideration of Motions To Suspend the Rules.
33. Oct. 7, 2004; H.R. Rep. No. 108-762 (2004). House Committee on Rules; Report: Waiving Points of Order Against the Conference Report To Accompany H.R. 4520, American Jobs Creation Act of 2004.
34. Oct. 7, 2004; H.R. Rep. No. 108-763 (2004). House Committee on Rules; Report: Waiving a Requirement of Clause 6(a) of Rule XIII with Respect to the Same Day Consideration of Certain Resolutions Reported by the Rules Committee.
35. Oct. 7, 2004; H.R. Rep. No. 108-754, pt. 1 (2004). House Committee on Ways and Means; Report: Requesting the President and Directing the Secretary of Health and Human Services Provide Certain Documents to the House of Representatives Relating to Estimates and Analyses of the Cost of the Medicare Prescription Drug Legislation.
36. Oct. 7, 2004; H.R. Rep. No. 108-755 (2004). House Committee on Ways and Means; Report: American Jobs Creation Act of 2004.
37. Oct. 7, 2004; S. Rep. No. 108-386 (2004). Senate Committee on Environment and Public Works; Report: Water Infrastructure Financing Act.
38. Oct. 7, 2004; S. Rep. No. 108-389 (2004). Senate Committee on Indian Affairs; Report: Bill To Direct the Secretary of Interior and the Heads of Other Federal Agencies To Carry Out an Agreement Resolving Major Issues Relating to the Adjudication of Water Rights in the Snake River Basin, Idaho.
39. Oct. 7, 2004; S. Rep. No. 108-387 (2004). Senate Committee on Health, Education, Labor, and Pensions; Report: Pancreatic Islet Cell Transplantation Act of 2004.

40. Oct. 7, 2004; S. Rep. No. 108-388 (2004). Senate Committee on Health, Education, Labor, and Pensions; Report: Children's Hospitals Educational Equity and Research Act or the CHEER Act.
41. Oct. 7, 2004; S. Rep. No. 108-390 (2004). Senate Committee on Health, Education, Labor, and Pensions; Report: HIPAA Recreational Injury Technical Correction Act.
42. Oct. 7, 2004; S. Rep. No. 108-391 (2004). Senate Committee on Health, Education, Labor, and Pensions; Report: Act for Elder Justice.
43. Oct. 6, 2004; H.R. Rep. No. 108-750, pt. 1 (2004). House Committee on Agriculture; Report: Specialty Crops Competitiveness Act of 2004.
44. Oct. 6, 2004; H.R. Rep. No. 108-748 (2004). House Committee on Financial Services; Report: Zero Downpayment Act of 2004.
45. Oct. 6, 2004; H.R. Rep. No. 108-747 (2004). House Committee on the Judiciary; Report: Security and Fairness Enhancement for America Act of 2003.
46. Oct. 6, 2004; H.R. Rep. No. 108-721, pt. 2 (2004). House Committee on Resources; Report: Tapoco Project Licensing Act of 2004.
47. Oct. 6, 2004; H.R. Rep. No. 108-738 (2004). House Committee on Resources; Report: Cumberland Island Wilderness Boundary Adjustment Act of 2004.
48. Oct. 6, 2004; H.R. Rep. No. 108-739 (2004). House Committee on Resources; Report: Potash Royalty Reduction Act of 2004.
49. Oct. 6, 2004; H.R. Rep. No. 108-740 (2004). House Committee on Resources; Report: Idaho Panhandle National Forest Improvement Act of 2003.
50. Oct. 6, 2004; H.R. Rep. No. 108-741 (2004). House Committee on Resources; Report: To Provide for the

Conveyance of Certain Public Land in Clark County, Nevada, for Use as a Heliport.

51. Oct. 6, 2004; H.R. Rep. No. 108-742 (2004). House Committee on Resources; Report: Native Hawaiian Government Reorganization Act of 2004.

52. Oct. 6, 2004; H.R. Rep. No. 108-743 (2004). House Committee on Resources; Report: Hibben Center Act.

53. Oct. 6, 2004; H.R. Rep. No. 108-744 (2004). House Committee on Resources; Report: Manhattan Project Sites Study Act of 2004.

54. Oct. 6, 2004; H.R. Rep. No. 108-745 (2004). House Committee on Resources; Report: Congratulating the U.S. Geological Survey on Its 125th Anniversary.

55. Oct. 6, 2004; H.R. Rep. No. 108-735 (2004). House Committee on Rules; Report: Providing for Consideration of H.R. 5212, Making Emergency Supplemental Appropriations for the Fiscal Year Ending Sept. 30, 2005, for Additional Disaster Assistance Relating to Storm Damage.

56. Oct. 6, 2004; H.R. Rep. No. 108-736 (2004). House Committee on Rules; Report: Waiving Points of Order Against the Conference Report To Accompany H.R. 4850, D.C. Appropriations Act, 2005.

57. Oct. 6, 2004; H.R. Rep. No. 108-737 (2004). House Committee on Rules; Report: Providing for Consideration of H.R. 5107, Justice for All Act of 2004.

58. Oct. 6, 2004; H.R. Rep. No. 108-746 (2004). House Committee on Transportation and Infrastructure; Report: Public Transportation Terrorism Prevention and Response Act of 2004.

59. Oct. 6, 2004; H.R. Rep. No. 108-749, pt. 1 (2004). House Committee on Transportation and Infrastructure; Report: Norman Y. Mineta Research and Special Programs Reorganization Act.

60. Oct. 5, 2004; H.R. Rep. No. 108-734 (2004). House Committee on Appropriations; Report: Making Appropriations for the Government of D.C. and Other Activities Chargeable in Whole or in Part Against Revenues of Said District for the Fiscal Year Ending Sept. 30, 2005.

61. Oct. 5, 2004; H.R. Rep. No. 108-726 (2004). House Committee on Energy and Commerce; Report: Pancreatic Islet Cell Transplantation Act of 2004.

62. Oct. 5, 2004; H.R. Rep. No. 108-727, pt. 1 (2004). House Committee on Energy and Commerce; Report: Patient Navigator Outreach and Chronic Disease Prevention Act of 2004.

63. Oct. 5, 2004; H.R. Rep. No. 108-728 (2004). House Committee on Energy and Commerce; Report: National All Schedules Prescription Electronic Reporting Act of 2004.

64. Oct. 5, 2004; H.R. Rep. No. 108-725 (2004). House Committee on Financial Services; Report: Military Personnel Financial Services Protection Act.

65. Oct. 5, 2004; H.R. Rep. No. 108-724, pt. 4 (2004). House Committee on Government Reform; Report: 9/11 Recommendations Implementation Act.

66. Oct. 5, 2004; H.R. Rep. No. 108-729 (2004). House Committee on Government Reform; Report: D.C. Civil Commitment Modernization Act of 2004.

67. Oct. 5, 2004; H.R. Rep. No. 108-733 (2004). House Committee on Government Reform; Report: Federal Workforce Flexibility Act of 2004.

68. Oct. 5, 2004; H.R. Rep. No. 108-730 (2004). House Committee on the Judiciary; Report: To Improve Access to Physicians in Medically Underserved Areas.

69. Oct. 5, 2004; H.R. Rep. No. 108-731 (2004). House Committee on the Judiciary; Report: To Amend Section 274A

of the Immigration and Nationality Act To Improve the Process for Verifying an Individual's Eligibility for Employment.

70. Oct. 5, 2004; H.R. Rep. No. 108-732 (2004). House Committee on the Judiciary; Report: Mentally Ill Offender Treatment and Crime Reduction Act of 2004.

71. Oct. 5, 2004; S. Rep. No. 108-385 (2004). Senate Committee on Commerce, Science, and Transportation; Report: National Earthquake Hazards Reduction Program Reauthorization Act of 2003.

72. Oct. 4, 2004; H.R. Rep. No. 108-724, pt. 2 (2004). House Committee on Armed Services; Report: 9/11 Recommendations Implementation Act.

73. Oct. 4, 2004; H.R. Rep. No. 108-712, pt. 2 (2004). House Committee on Energy and Commerce; Report: Southern Ute and Colorado Intergovernmental Agreement Implementation Act of 2003.

74. Oct. 4, 2004; H.R. Rep. No. 108-721, pt. 1 (2004). House Committee on Energy and Commerce; Report: Tapoco Project Licensing Act of 2004.

75. Oct. 4, 2004; H.R. Rep. No. 108-724, pt. 3 (2004). House Committee on Financial Services; Report: 9/11 Recommendations Implementation Act.

76. Oct. 4, 2004; H.R. Rep. No. 108-724, pt. 1 (2004). House Select Committee on Intelligence; Report: 9/11 Recommendations Implementation Act.

77. Oct. 4, 2004; H.R. Rep. No. 108-716, pt. 1 (2004). House Committee on Resources; Report: Mingo Jobs Corps Civilian Conservation Center Transfer.

78. Oct. 4, 2004; H.R. Rep. No. 108-717 (2004). House Committee on Resources; Report: Ojito Wilderness Act.

79. Oct. 4, 2004; H.R. Rep. No. 108-718, pt. 1 (2004). House Committee on Resources; Report: To Authorize the Secretary of the Interior To Construct Facilities To Provide Water for

Irrigation – Municipal – Domestic, Military, and Other Uses from the Santa Margarita River, California.

80. Oct. 4, 2004; H.R. Rep. No. 108-719 (2004). House Committee on Resources; Report: Provo River Project Transfer Act.

81. Oct. 4, 2004; H.R. Rep. No. 108-720 (2004). House Committee on Resources; Report: Lincoln County Conservation, Recreation, and Development Act of 2004.

82. Oct. 4, 2004; H.R. Rep. No. 108-723 (2004). House Committee on Rules; Report: Providing for Consideration of S. 878, a Bill To Create Additional Federal Court Judgeships.

83. Oct. 4, 2004; H.R. Rep. No. 108-722 (2004). House Committee on Standards of Official Conduct; Report: Investigation of Certain Allegations Related to Voting on the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.

84. Oct. 4, 2004; S. Rep. No. 108-383 (2004). Senate Committee on Governmental Affairs; Report: Executive Branch Financial Accountability Reporting Act of 2004.

85. Oct. 4, 2004; S. Rep. No. 108-384 (2004). Senate Committee on Health, Education, Labor, and Pensions; Report: Carl D. Perkins Career and Technical Education Improvement Act of 2004.

86. Oct. 1, 2004; S. Rep. No. 108-382 (2004). Senate Committee on Environment and Public Works; Report: Economic Development Administration Reauthorization Act of 2004.

87. Sept. 30, 2004; H.R. Rep. No. 108-711 (2004). House Committee on the Judiciary; Report: Justice for All Act of 2004.

88. Sept. 30, 2004; H.R. Rep. No. 108-712, pt. 1 (2004). House Committee on Resources; Report: Southern Ute and

Colorado Intergovernmental Agreement Implementation Act of 2003.

89. Sept. 30, 2004; H.R. Rep. No. 108-713 (2004). House Committee on Resources; Report: Petrified Forest National Park Expansion Act of 2004.

90. Sept. 30, 2004; H.R. Rep. No. 108-714 (2004). House Committee on Resources; Report: Release of U.S. Interests in Certain Railroad Grant Lands in Tipton, California, California.

91. Sept. 30, 2004; H.R. Rep. No. 108-715 (2004). House Committee on Resources; Report: To Direct the Secretary of the Interior To Convey Certain Land Held in Trust for the Paiute Indian Tribe of Utah to the City of Richfield, Utah.

92. Sept. 30, 2004; H.R. Rep. No. 108-710 (2004). House Committee on Rules; Report: Providing for Consideration of H.R. 5183, Surface Transportation Extension Act of 2004, Part V.

93. Sept. 29, 2004; H.R. Rep. No. 108-708 (2004). House Committee on the Judiciary; Report: Authorization for Additional Federal Judgeships.

94. Sept. 29, 2004; H.R. Rep. No. 108-709 (2004). House Committee on Rules; Report: Waiving a Requirement of Clause 6(a) of Rule XIII with Respect to the Same Day Consideration of Certain Resolutions Reported by the Rules Committee.

95. Sept. 28, 2004; H.R. Rep. No. 108-701 (2004). House Committee on Resources; Report: Colorado River Indian Reservation Boundary Correction Act.

96. Sept. 28, 2004; H.R. Rep. No. 108-702 (2004). House Committee on Resources; Report: Chickasaw National Recreation Area Land Exchange Act of 2004.

97. Sept. 28, 2004; H.R. Rep. No. 108-703 (2004). House Committee on Resources; Report: Truman Farm Home Expansion Act.

98. Sept. 28, 2004; H.R. Rep. No. 108-704 (2004). House Committee on Resources; Report: Montana Water Contracts Extension Act of 2004.

99. Sept. 28, 2004; H.R. Rep. No. 108-705 (2004). House Committee on Rules; Report: Providing for Consideration of House Joint Resolution 106, Proposing an Amendment to the Constitution of the U.S. Relating to Marriage.

100. Sept. 28, 2004; H.R. Rep. No. 108-706 (2004). House Committee on Rules; Report: Providing for Consideration of House Joint Resolution 107, Making Continuing Appropriations for FY 2005.

101. Sept. 28, 2004; H.R. Rep. No. 108-707 (2004). House Committee on Rules; Report: Providing for Consideration of H.R. 3193, D.C. Personal Protection Act.

102. Sept. 28, 2004; S. Rep. No. 108-381 (2004). Senate Committee on Commerce, Science, and Transportation; Report: Junk Fax Prevention Act of 2004.

103. Sept. 28, 2004; S. Rep. No. 108-360 (2004). Senate Committee on Energy and Natural Resources; Report: Arizona Water Settlements Act.

104. Sept. 28, 2004; S. Rep. No. 108-361 (2004). Senate Committee on Energy and Natural Resources; Report: PILT and Refuge Revenue Sharing Permanent Funding Act.

105. Sept. 28, 2004; S. Rep. No. 108-362 (2004). Senate Committee on Energy and Natural Resources; Report: Upper White Salmon Wild and Scenic Rivers Act.

106. Sept. 28, 2004; S. Rep. No. 108-363 (2004). Senate Committee on Energy and Natural Resources; Report: Uinta Research and Curatorial Center.

107. Sept. 28, 2004; S. Rep. No. 108-364 (2004). Senate Committee on Energy and Natural Resources; Report: Benjamin Franklin National Memorial Financial Assistance Act.

108.Sept. 28, 2004; S. Rep. No. 108-365 (2004). Senate Committee on Energy and Natural Resources; Report: Provo River Project Transfer Act.

109.Sept. 28, 2004; S. Rep. No. 108-366 (2004). Senate Committee on Energy and Natural Resources; Report: New Jersey Coastal Heritage Trail Route Act.

110.Sept. 28, 2004; S. Rep. No. 108-367 (2004). Senate Committee on Energy and Natural Resources; Report: Rocky Mountain National Park Boundary Adjustment Act of 2004.

111.Sept. 28, 2004; S. Rep. No. 108-368 (2004). Senate Committee on Energy and Natural Resources; Report: Caribbean National Forest Act of 2004.

112.Sept. 28, 2004; S. Rep. No. 108-369 (2004). Senate Committee on Energy and Natural Resources; Report: Chickasaw National Recreation Area Land Exchange Act of 2004.

113.Sept. 28, 2004; S. Rep. No. 108-370 (2004). Senate Committee on Energy and Natural Resources; Report: Montana National Forests Boundary Adjustment Act of 2004.

114.Sept. 28, 2004; S. Rep. No. 108-371 (2004). Senate Committee on Energy and Natural Resources; Report: Wilson's Creek National Battlefield Boundary Adjustment Act of 2004.

115.Sept. 28, 2004; S. Rep. No. 108-372 (2004). Senate Committee on Energy and Natural Resources; Report: Redwood National Park Boundary Adjustment Act of 2004.

116.Sept. 28, 2004; S. Rep. No. 108-373 (2004). Senate Committee on Energy and Natural Resources; Report: Pecos National Historic Park Land Exchange Act of 2004.

117.Sept. 28, 2004; S. Rep. No. 108-374 (2004). Senate Committee on Energy and Natural Resources; Report: Fort Frederica National Monument Land Exchange Act.

118.Sept. 28, 2004; S. Rep. No. 108-375 (2004). Senate Committee on Energy and Natural Resources; Report: California Missions Preservation Act.

119.Sept. 28, 2004; S. Rep. No. 108-376 (2004). Senate Committee on Energy and Natural Resources; Report: Highlands Conservation Act.

120.Sept. 28, 2004; S. Rep. No. 108-377 (2004). Senate Committee on Energy and Natural Resources; Report: American Samoa Delegate Plurality Vote.

121.Sept. 28, 2004; S. Rep. No. 108-378 (2004). Senate Committee on Energy and Natural Resources; Report: John Muir National Historic Site Boundary Adjustment Act.

122.Sept. 28, 2004; S. Rep. No. 108-379 (2004). Senate Committee on Energy and Natural Resources; Report: Department of Energy High-End Computing Revitalization Act of 2004.

123.Sept. 28, 2004; S. Rep. No. 108-380 (2004). Senate Committee on Indian Affairs; Report: Bill To Amend the Indian Gaming Regulatory Act To Include Provisions Relating to the Payment and Administration of Gaming Fees.

124.Sept. 27, 2004; S. Rep. No. 108-359 (2004). Senate Committee on Governmental Affairs; Report: National Intelligence Reform Act of 2004.

125.Sept. 27, 2004; S. Rep. No. 108-358 (2004). Senate Committee on Veterans' Affairs; Report: Department of Veterans Affairs Real Property and Facilities Management Improvement Act of 2004.

126.Sept. 24, 2004; H.R. Rep. No. 108-700 (2004). House Committee on the Judiciary; Report: Piracy Deterrence and Education Act of 2004.

127.Sept. 23, 2004; H.R. Rep. No. 108-697 (2004). House Committee on Energy and Commerce; Report: Requesting the President of the U.S. To Provide Certain Information to the

House of Representatives Respecting the National Energy Policy Development Group.

128.Sept. 23, 2004; H.R. Rep. No. 108-698 (2004). House Committee on the Judiciary; Report: Internet Spyware (I-SPY) Prevention Act of 2004.

129.Sept. 23, 2004; H.R. Rep. No. 108-699 (2004). House Committee on Rules; Report: Waiving Points of Order Against the Conference Report To Accompany H.R. 1308, Working Families Tax Relief Act of 2004.

130.Sept. 23, 2004; H.R. Rep. No. 108-696 (2004). House Committee on Ways and Means; Report: Working Families Tax Relief Act of 2004.

131.Sept. 23, 2004; S. Rep. No. 108-357 (2004). Senate Committee on Veterans' Affairs; Report: Department of Veterans Affairs Health Care Personnel Enhancement Act of 2004.

132.Sept. 22, 2004; H.R. Rep. No. 108-694 (2004). House Committee on Energy and Commerce; Report: Mammography Quality Standards Reauthorization Act of 2004.

133.Sept. 22, 2004; H.R. Rep. No. 108-695 (2004). House Committee on Rules; Report: Waiving a Requirement of Clause 6(a) of Rule XIII with Respect to the Same Day Consideration of Certain Resolutions Reported by the Rules Committee.

134.Sept. 21, 2004; H.R. Rep. No. 108-691 (2004). House Committee on the Judiciary; Report: Pledge Protection Act of 2004.

135.Sept. 21, 2004; H.R. Rep. No. 108-692 (2004). House Committee on Rules; Report: Waiving a Requirement of Clause 6(a) of Rule XIII with Respect to the Same Day Consideration of Certain Resolutions Reported by the Rules Committee.

136.Sept. 21, 2004; H.R. Rep. No. 108-693 (2004). House Committee on Rules; Report: Providing for Consideration of H.R. 2028, Pledge Protection Act of 2004.

137.Sept. 21, 2004; S. Rep. No. 108-353 (2004). Senate Committee on Appropriations; Report: Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Bill of 2005.

138.Sept. 21, 2004; S. Rep. No. 108-354 (2004). Senate Committee on Appropriations; Report: D.C. Appropriations Bill of 2005.

139.Sept. 21, 2004; S. Rep. No. 108-355 (2004). Senate Committee on Indian Affairs; Report: Providing Compensation to the Lower Brule and Crow Creek Sioux Tribes of South Dakota for Damage to Tribal Land Caused by Pick-Sloan Projects Along the Missouri River.

140.Sept. 20, 2004; S. Rep. No. 108-347 (2004). Senate Committee on Energy and Natural Resources; Report: Tularosa Basin Water Reclamation Act.

141.Sept. 20, 2004; S. Rep. No. 108-348 (2004). Senate Committee on Governmental Affairs; Report: Providing for Additional Responsibilities for the Chief Information Officer of the Department of Homeland Security Relating to Geospatial Information.

142.Sept. 20, 2004; S. Rep. No. 108-349 (2004). Senate Committee on Governmental Affairs; Report: Amending the D.C. College Access Act of 1999 To Permanently Authorize the Public School and Private School Tuition Assistance Programs Established Under the Act.

143.Sept. 20, 2004; S. Rep. No. 108-350 (2004). Senate Committee on Governmental Affairs; Report: Homeland Security Civil Rights and Civil Liberties Protection Act of 2004.

144.Sept. 20, 2004; S. Rep. No. 108-351 (2004). Senate Committee on Veterans' Affairs; Report: Veterans Compensation Cost-of-Living Adjustment Act of 2004.
145.Sept. 20, 2004; S. Rep. No. 108-352 (2004). Senate Committee on Veterans' Affairs; Report: Veterans' Benefits Improvements Act of 2004.
146.Sept. 17, 2004; H.R. Rep. No. 108-689 (2004). House Committee on the Judiciary; Report: Designation of National Tree.
147.Sept. 17, 2004; H.R. Rep. No. 108-690 (2004). House Committee on the Judiciary; Report: Codification of Title 46, U.S. Code, "Shipping" As Positive Law.
148.Sept. 16, 2004; S. Rep. No. 108-346 (2004). Senate Committee on Appropriations; Report: Foreign Operations, Export Financing, and Related Programs Appropriation Bill for 2005.
149.Sept. 15, 2004; H.R. Rep. No. 108-687, pt. 1 (2004). House Committee on Resources; Report: Brown Tree Snake Control and Eradication Act of 2004.
150.Sept. 15, 2004; H.R. Rep. No. 108-688, pt. 1 (2004). House Committee on Transportation and Infrastructure; Report: Amend the Tijuana River Valley Estuary and Beach Sewage Cleanup Act.
151.Sept. 15, 2004; S. Rep. No. 108-342 (2004). Senate Committee on Appropriations; Report: Transportation, Treasury and General Government Appropriations Bill for 2005.
152.Sept. 15, 2004; S. Rep. No. 108-344 (2004). Senate Committee on Appropriations; Report: Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Bill for 2005.
153.Sept. 15, 2004; S. Rep. No. 108-345 (2004). Senate Committee on Appropriations; Report: Departments of Labor,

Health and Human Services, and Education, and Related Agencies Appropriation Bill for 2005.

154.Sept. 15, 2004; S. Rep. No. 108-343 (2004). Senate Committee on Indian Affairs; Report: To Reaffirm the Inherent Sovereign Rights of the Osage Tribe To Determine Its Membership and Form of Government.

155.Sept. 14, 2004; H.R. Rep. No. 108-686 (2004). House Committee on Rules; Report: Providing for Consideration of H.R. 5025, Transportation, Treasury, and Independent Agencies Appropriations Act for 2005.

156.Sept. 14, 2004; H.R. Rep. No. 108-685, pt. 1 (2004). House Committee on Ways and Means; Report: Social Security Number Privacy and Identity Theft Prevention Act of 2004.

157.Sept. 14, 2004; S. Rep. No. 108-338 (2004). Senate Committee on Appropriations; Report: Further Revised Allocation to Subcommittees of Budget Totals for FY 2005.

158.Sept. 14, 2004; S. Rep. No. 108-340 (2004). Senate Committee on Appropriations; Report: Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Bill for 2005.

159.Sept. 14, 2004; S. Rep. No. 108-341 (2004). Senate Committee on Appropriations; Report: Department of the Interior and Related Agencies Appropriations Bill for 2005.

160.Sept. 14, 2004; S. Rep. No. 108-339 (2004). Senate Committee on Governmental Affairs; Report: To Reauthorize the Congressional Award Act.

161.Sept. 13, 2004; H.R. Rep. No. 108-679 (2004). House Committee on the Judiciary; Report: Volunteer Pilot Organization Protection Act of 2004.

162.Sept. 13, 2004; H.R. Rep. No. 108-680 (2004). House Committee on the Judiciary; Report: Good Samaritan Volunteer Firefighter Assistance Act of 2004.

163.Sept. 13, 2004; H.R. Rep. No. 108-681 (2004). House Committee on the Judiciary; Report: Nonprofit Athletic Organization Protection Act of 2003.
164.Sept. 13, 2004; H.R. Rep. No. 108-682 (2004). House Committee on the Judiciary; Report: Lawsuit Abuse Reduction Act of 2004.
165.Sept. 13, 2004; H.R. Rep. No. 108-684 (2004). House Committee on Rules; Report: Providing for Consideration of H.R. 4571, Lawsuit Abuse Reduction Act of 2004.
166.Sept. 13, 2004; H.R. Rep. No. 108-675 (2004). House Committee on Transportation and Infrastructure; Report: Water Quality Investment Act.
167.Sept. 13, 2004; H.R. Rep. No. 108-676 (2004). House Committee on Transportation and Infrastructure; Report: Extend Authorization of Appropriations for Lake Pontchartrain Basin.
168.Sept. 13, 2004; H.R. Rep. No. 108-677 (2004). House Committee on Transportation and Infrastructure; Report: Reauthorize the Chesapeake Bay Program.
169.Sept. 13, 2004; H.R. Rep. No. 108-678 (2004). House Committee on Transportation and Infrastructure; Report: Reauthorize the National Estuary Program.
170.Sept. 13, 2004; H.R. Rep. No. 108-683 (2004). House Committee on Veterans' Affairs; Report: Servicemembers and Veterans Legal Protections Act of 2004.
171.Sept. 9, 2004; H.R. Rep. No. 108-674 (2004). House Committee on Appropriations; Report: Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Bill for 2005.
172.Sept. 9, 2004; H.R. Rep. No. 108-673 (2004). House Committee on Government Reform; Report: Transit Pass Transportation Fringe Benefits for Federal Employees.

173.Sept. 8, 2004; H.R. Rep. No. 108-671 (2004). House Committee on Appropriations; Report: Departments of Transportation and Treasury and Independent Agencies Appropriations Bill for 2005.

174.Sept. 8, 2004; H.R. Rep. No. 108-672, pt. 1 (2004). House Committee on Government Reform; Report: Postal Accountability and Enhancement Act.

175.Sept. 8, 2004; H.R. Rep. No. 108-670 (2004). House Committee on the Judiciary; Report: Family Movie Act of 2004.

176.Sept. 8, 2004; H.R. Rep. No. 108-672, pt. 2 (2004). House Committee on the Judiciary; Report: Postal Accountability and Enhancement Act.

177.Sept. 8, 2004; H.R. Rep. No. 108-664 (2004). House Committee on Resources; Report: Brownsville Public Utility Board Water Recycling and Desalinization Project.

178.Sept. 8, 2004; H.R. Rep. No. 108-665 (2004). House Committee on Resources; Report: Availability of NOAA Real Property on Virginia Key, Florida.

179.Sept. 8, 2004; H.R. Rep. No. 108-666, pt. 1 (2004). House Committee on Resources; Report: To Facilitate the Exchange of Small Tracts of Land.

180.Sept. 8, 2004; H.R. Rep. No. 108-667 (2004). House Committee on Resources; Report: To Clarify the Intent of Congress with Respect to the Continued Use of Established Commercial Outfitter Hunting Camps on the Salmon River.

181.Sept. 8, 2004; H.R. Rep. No. 108-668 (2004). House Committee on Resources; Report: Southern California Groundwater Remediation Act.

182.Sept. 8, 2004; H.R. Rep. No. 108-669 (2004). House Committee on Resources; Report: Use of Cabins in the Mineral King Valley.

183.Sept. 8, 2004; H.R. Rep. No. 108-663 (2004). House Committee on Veterans' Affairs; Report: Veterans Health Programs and Facilities Enhancement Act of 2004.

184.Sept. 8, 2004; S. Rep. No. 108-336 (2004). Senate Committee on Appropriations; Report: Allocation to Subcommittees of Budget Totals from the Concurrent Resolution for FY 2005.

185.Sept. 8, 2004; S. Rep. No. 108-337 (2004). Senate Committee on Appropriations; Report: Revised Allocation to Subcommittees of Budget Totals for FY 2005.

186.Sept. 7, 2004; H.R. Rep. No. 108-636 (2004). House Committee on Appropriations; Report: Departments of Labor Health and Human Services, and Education, and Related Agencies Appropriation Bill for 2005.

187.Sept. 7, 2004; H.R. Rep. No. 108-659 (2004). House Committee on Education and the Workforce; Report: Vocational and Technical Education for the Future Act.

188.Sept. 7, 2004; H.R. Rep. No. 108-658 (2004). House Committee on the Judiciary; Report: Directing the Attorney General To Transmit to the House of Representatives Documents in the Possession of the Attorney General Relating to the Treatment of Prisoners and Detainees in Iraq, Afghanistan, and Guantanamo Bay.

189.Sept. 7, 2004; H.R. Rep. No. 108-660 (2004). House Committee on the Judiciary; Report: Satellite Home Viewer Extension and Reauthorization Act of 2004.

190.Sept. 7, 2004; H.R. Rep. No. 108-637 (2004). House Committee on Resources; Report: Taunton, Massachusetts Special Resources Study Act.

191.Sept. 7, 2004; H.R. Rep. No. 108-638 (2004). House Committee on Resources; Report: Amending the Organic Act of Guam for the Purposes of Clarifying the Local Judicial Structure of Guam.

192.Sept. 7, 2004; H.R. Rep. No. 108-639 (2004). House Committee on Resources; Report: Castillo de San Marcos National Monument Preservation and Education Act; Castillo de San Marcos National Monument Boundary Adjustment Act of 2004.

193.Sept. 7, 2004; H.R. Rep. No. 108-640 (2004). House Committee on Resources; Report: To Authorize the Secretary of the Interior To Study the Suitability and Feasibility of Designating Castle Nugent Farms Located on St. Croix, Virgin Islands, as a Unit of the National Park System.

194.Sept. 7, 2004; H.R. Rep. No. 108-641 (2004). House Committee on Resources; Report: Replacement of John H. Chafee Coastal Barrier Resources System Map for Cedar Keys Unit P25/P25P.

195.Sept. 7, 2004; H.R. Rep. No. 108-642 (2004). House Committee on Resources; Report: Western Reserve Heritage Areas Study Act.

196.Sept. 7, 2004; H.R. Rep. No. 108-643 (2004). House Committee on Resources; Report: To Authorize the Secretary of the Interior To Participate in the Design and Construction of the Riverside-Corona Feeder in Cooperation with the Western Municipal Water District of Riverside, California.

197.Sept. 7, 2004; H.R. Rep. No. 108-644 (2004). House Committee on Resources; Report: Craig Recreation Land Purchase Act.

198.Sept. 7, 2004; H.R. Rep. No. 108-645 (2004). House Committee on Resources; Report: To Create the Office of Chief Financial Officer of the Government of the Virgin Islands.

199.Sept. 7, 2004; H.R. Rep. No. 108-646 (2004). House Committee on Resources; Report: To Authorize the Secretary of the Interior, Through the Bureau of Reclamation, To

Conduct a Feasibility Study on the Alder Creek Water Storage and Conservation Project in El Dorado County, California.

200.Sept. 7, 2004; H.R. Rep. No. 108-647 (2004). House Committee on Resources; Report: Rancho El Cajon Boundary Reconciliation Act.

201.Sept. 7, 2004; H.R. Rep. No. 108-648 (2004). House Committee on Resources; Report: National Geologic Mapping Reauthorization Act of 2004.

202.Sept. 7, 2004; H.R. Rep. No. 108-649 (2004). House Committee on Resources; Report: Authorization of Mokelumne River Regional Water Storage and Conjunctive Use Project Study.

203.Sept. 7, 2004; H.R. Rep. No. 108-650 (2004). House Committee on Resources; Report: Llagas Reclamation Groundwater Remediation Initiative.

204.Sept. 7, 2004; H.R. Rep. No. 108-651 (2004). House Committee on Resources; Report: Wilson's Creek National Battlefield Boundary Adjustment Act of 2004.

205.Sept. 7, 2004; H.R. Rep. No. 108-652 (2004). House Committee on Resources; Report: Grey Towers National Historic Site Act of 2004.

206.Sept. 7, 2004; H.R. Rep. No. 108-653 (2004). House Committee on Resources; Report: To Authorize the Secretary of the Interior To Contract with the City of Cheyenne, Wyoming, for the Storage of the City's Water in the Kendrick Project, Wyoming.

207.Sept. 7, 2004; H.R. Rep. No. 108-654 (2004). House Committee on Resources; Report: Conveyance of Property in Pope County, Arkansas.

208.Sept. 7, 2004; H.R. Rep. No. 108-655 (2004). House Committee on Resources; Report: Harpers Ferry National Historical Park Boundary Revision Act of 2004.

209.Sept. 7, 2004; H.R. Rep. No. 108-656 (2004). House Committee on Resources; Report: American Indian Probate Reform Act of 2004.

210.Sept. 7, 2004; H.R. Rep. No. 108-657 (2004). House Committee on Resources; Report: Honoring the Achievements of Siegfried and Roy, Recognizing the Impact of Their Efforts on the Conservation of Endangered Species both Domestically and Worldwide, and Wishing Roy Horn a Full and Speedy Recovery.

211.Sept. 7, 2004; H.R. Rep. No. 108-661 (2004). House Committee on Rules; Report: Providing for Consideration of H.R. 5006, Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act for 2005.

212.Sept. 7, 2004; H.R. Rep. No. 108-662, pt. 1 (2004). House Committee on Science; Report: Surface Transportation Research and Development Act of 2004.

213.Sept. 7, 2004; S. Rep. No. 108-335 (2004). Senate Committee on Indian Affairs; Report: To Establish Grant Programs for the Development of Telecommunications Capacities in Indian County.

2006 COMMITTEE REPORTS*

1. Sept. 29, 2006; H.R. Rep. No. 109-702 (2006). House Committee on Armed Services; Report: John Warner National Defense Authorization Act for FY 2007.

2. Sept. 29, 2006; H.R. Rep. No. 109-710, pt. 1 (2006). House Committee on Agriculture; Report: Resolution on Use of Renewable Resources for Energy Production.

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*. The 2006 federal election occurred on November 7th. Sixty days prior to the Federal Election Day was September 8th. The following Reports, listed here in reverse chronological order, were issued by Senate and House Committees during that time.

3. Sept. 29, 2006; H.R. Rep. No. 109-705 (2006). House Committee on Energy and Commerce; Report: National Breast and Cervical Cancer Early Detection Program Reauthorization Act of 2006.
4. Sept. 29, 2006; H.R. Rep. No. 109-708, pt. 1 (2006). House Committee on Energy and Commerce; Report: Social Security Number Protection Act of 2006.
5. Sept. 29, 2006; H.R. Rep. No. 109-711 (2006). House Committee on Homeland Security; Report: Safe Port Act.
6. Sept. 29, 2006; H.R. Rep. No. 109-707, pt. 1 (2006). House Committee on Homeland Security; Report: Chemical Facility Anti-Terrorism Act of 2006.
7. Sept. 29, 2006; H.R. Rep. No. 109-706 (2006). House Committee on International Relations; Report: Department of State Authorities Act of 2006.
8. Sept. 29, 2006; H.R. Rep. No. 109-703 (2006). House Committee on Rules; Report: Waiving Points of Order Against the Conference Report To Accompany H.R. 5122, National Defense Authorization Act for FY 2007.
9. Sept. 29, 2006; H.R. Rep. No. 109-709, pt. 1 (2006). House Committee on Transportation and Infrastructure; Report: Maritime Terminal Security Enhancement Act of 2006.
10. Sept. 29, 2006; H.R. Rep. No. 109-704 (2006). House Committee on Ways and Means; Report: Health Opportunity Patient Empowerment Act of 2006.
11. Sept. 29, 2006; S. Rep. No. 109-356 (2006). Senate Committee on Commerce – Science, and Transportation; Report: National Integrated Drought Information System Act of 2006.
12. Sept. 29, 2006; S. Rep. No. 109-357 (2006). Senate Committee on Commerce, Science, and Transportation; Report: Pool and Spa Safety Act.

13. Sept. 29, 2006; S. Rep. No. 109-355 (2006). Senate Committee on Commerce, Science, and Transportation; Report: Communications Opportunity, Promotion, and Enhancement Act of 2006.
14. Sept. 29, 2006; S. Rep. No. 109-354 (2006). Senate Committee on Indian Affairs; Report: Pueblo of Isleta Settlement and Natural Resources Restoration Act of 2006.
15. Sept. 28, 2006; H.R. Rep. No. 109-699 (2006). House Committee on Appropriations; Report: Making Appropriations for the Department of Homeland Security for the Fiscal Year Ending Sept. 30, 2007.
16. Sept. 28, 2006; H.R. Rep. No. 109-695 (2006). House Committee on Energy and Commerce; Report: Ryan White HIV/AIDS Treatment Modernization Act of 2006.
17. Sept. 28, 2006; H.R. Rep. No. 109-697 (2006). House Committee on Financial Services; Report: Hawaiian Homeownership Opportunity Act of 2006.
18. Sept. 28, 2006; H.R. Rep. No. 109-693 (2006). House Committee on Resources; Report: Endangered Species Compliance and Transparency Act of 2006.
19. Sept. 28, 2006; H.R. Rep. No. 109-694 (2006). House Committee on Resources; Report: To Require the Prompt Review by the Secretary of the Interior of the Longstanding Petitions for Federal Recognition of Certain Indian Tribes.
20. Sept. 28, 2006; H.R. Rep. No. 109-696 (2006). House Committee on Rules; Report: Providing for Consideration of H.R. 5825, Electronic Surveillance Modernization Act.
21. Sept. 28, 2006; H.R. Rep. No. 109-700 (2006). House Committee on Rules; Report: Waiving a Requirement of Clause 6(a) of Rule XIII with Respect to the Same Day Consideration of Certain Resolutions Reported by the Rules Committee.

22. Sept. 28, 2006; H.R. Rep. No. 109-701 (2006). House Committee on Rules; Report: Waiving Points of Order Against the Conference Report To Accompany H.R. 5441, Department of Homeland Security Appropriations Act for 2007, Providing for Consideration of S. 3930, Military Commissions Act of 2006, Providing for Consideration of H.R. 4772, Private Property Rights Implementation Act of 2006.
23. Sept. 28, 2006; H.R. Rep. No. 109-698 (2006). House Committee on Science; Report: U.S. Tsunami Warning and Education Act.
24. Sept. 27, 2006; H.R. Rep. No. 109-689 (2006). House Committee on International Relations; Report: Directing the Secretary of State To Provide to the House of Representatives Certain Documents in the Possession of the Secretary of State Relating to the Report Submitted to the Committee on International Relations of the House of Representatives on July 28, 2006, Pursuant to the Iran and Syria Nonproliferation Act.
25. Sept. 27, 2006; H.R. Rep. No. 109-690 (2006). House Committee on Rules; Report: Providing for Consideration of Motions To Suspend the Rules.
26. Sept. 27, 2006; H.R. Rep. No. 109-691 (2006). House Committee on Rules; Report: Waiving a Requirement of Clause 6(a) of Rule XIII with Respect to the Same Day Consideration of Certain Resolutions Reported by the Rules Committee.
27. Sept. 27, 2006; H.R. Rep. No. 109-692 (2006). House Committee on Rules; Report: Providing for Consideration of H.R. 4772, Private Property Rights Implementation Act of 2006.
28. Sept. 27, 2006; S. Rep. No. 109-351 (2006). Senate Committee on Environment and Public Works; Report: To Promote Remediation for Inactive and Abandoned Mines.

29. Sept. 27, 2006; S. Rep. No. 109-352 (2006). Senate Committee on Environment and Public Works; Report: Extend Authorization of Appropriations for Lake Pontchartrain Basin.
30. Sept. 27, 2006; S. Rep. No. 109-353 (2006). Senate Committee on Environment and Public Works; Report: Dana Point Desalination Project Authorization Act.
31. Sept. 26, 2006; H.R. Rep. No. 109-681 (2006). House Committee on Energy and Commerce; Report: Extension of Time for Federal Energy Regulatory Commission Project Numbered 11480.
32. Sept. 26, 2006; H.R. Rep. No. 109-682 (2006). House Committee on Energy and Commerce; Report: Extension of Time for the Federal Energy Regulatory Commission Hydroelectric Project Numbered 1651.
33. Sept. 26, 2006; H.R. Rep. No. 109-683 (2006). House Committee on Energy and Commerce; Report: Extension of Time for Federal Energy Regulatory Commission Projects Numbered 11547, 10822, and 10823.
34. Sept. 26, 2006; H.R. Rep. No. 109-684 (2006). House Committee on Energy and Commerce; Report: Arrowrock Hydroelectric Project Numbered 4656.
35. Sept. 26, 2006; H.R. Rep. No. 109-685 (2006). House Committee on Energy and Commerce; Report: Reinstatement of License for Federal Energy Regulatory Commission Project Numbered 7307.
36. Sept. 26, 2006; H.R. Rep. No. 109-686 (2006). House Committee on Energy and Commerce; Report: Biodefense and Pandemic Vaccine and Drug Development Act of 2006.
37. Sept. 26, 2006; H.R. Rep. No. 109-687 (2006). House Committee on Energy and Commerce; Report: National Institutes of Health Reform Act of 2006.

38. Sept. 26, 2006; H.R. Rep. No. 109-688 (2006). House Committee on Rules; Report: Providing for Consideration of H.R. 6166, Military Commissions Act of 2006.
39. Sept. 26, 2006; S. Rep. No. 109-350 (2006). Senate Committee on Appropriations; Report: Revised Allocation to Subcommittees of Budget Totals for FY 2007.
40. Sept. 26, 2006; S. Rep. No. 109-349 (2006). Senate Committee on Indian Affairs; Report: Waiving Application of the Indian Self-Determination and Education Assistance Act to a Specific Parcel of Real Property by the U.S. to 2 Indian Tribes in the State of Oregon.
41. Sept. 26, 2006; S. Rep. No. 109-348 (2006). Senate Committee on Health, Education, Labor, and Pensions; Report: American History Achievement Act.
42. Sept. 25, 2006; H.R. Rep. No. 109-676 (2006). House Committee on Appropriations; Report: Making Appropriations for the Department of Defense for the Fiscal Year Ending Sept. 30, 2007.
43. Sept. 25, 2006; H.R. Rep. No. 109-674 (2006). House Committee on Homeland Security; Report: Promoting Antiterrorism Capabilities Through International Cooperation Act.
44. Sept. 25, 2006; H.R. Rep. No. 109-584, pt. 2 (2006). House Committee on House Administration; Report: Commission To Study the Potential Creation of a National Museum of the American Latino Community Act of 2006.
45. Sept. 25, 2006; H.R. Rep. No. 109-680, pt. 1 (2006). House Select Committee on Intelligence; Report: Electronic Surveillance Modernization Act.
46. Sept. 25, 2006; H.R. Rep. No. 109-664, pt. 2 (2006). House Committee on Judiciary; Report: Military Commissions Act of 2006.

47. Sept. 25, 2006; H.R. Rep. No. 109-680, pt. 2 (2006). House Committee on Judiciary; Report: Electronic Surveillance Modernization Act.
48. Sept. 25, 2006; H.R. Rep. No. 109-675 (2006). House Committee on Judiciary; Report: Federal Agency Protection of Privacy Act of 2005.
49. Sept. 25, 2006; H.R. Rep. No. 109-677 (2006). House Committee on Rules; Report: Waiving Points of Order Against the Conference Report To Accompany H.R. 5631, Department of Defense Appropriations Act for 2007.
50. Sept. 25, 2006; H.R. Rep. No. 109-678 (2006). House Committee on Rules; Report: Providing for Consideration of H.R. 2679, Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006.
51. Sept. 25, 2006; H.R. Rep. No. 109-679 (2006). House Committee on Rules; Report: Providing for Consideration of S. 403, Child Custody Protection Act.
52. Sept. 25, 2006; S. Rep. No. 109-346 (2006). Senate Committee on Environment and Public Works; Report: Convention on Supplementary Compensation for Nuclear Damage Contingent Cost Allocation Act.
53. Sept. 25, 2006; S. Rep. No. 109-347 (2006). Senate Committee on Environment and Public Works; Report: Nuclear Release Notice Act of 2006.
54. Sept. 21, 2006; H.R. Rep. No. 109-672 (2006). House Committee on Judiciary; Report: Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE) Modernization and Reform Act of 2006.
55. Sept. 21, 2006; H.R. Rep. No. 109-673 (2006). House Committee on Judiciary; Report: Pilot Programs for Patent Judges.

56. Sept. 21, 2006; S. Rep. No. 109-345 (2006). Senate Committee on Environment and Public Works; Report: Wastewater Treatment Works Security Act of 2006.
57. Sept. 20, 2006; H.R. Rep. No. 109-671 (2006). House Committee on Rules; Report: Providing for Consideration of H.R. 4830, Border Tunnel Prevention Act of 2006, For Consideration of H.R. 6094, Community Protection Act of 2006, and for Consideration of H.R. 6095, Immigration Law Enforcement Act of 2006.
58. Sept. 20, 2006; S. Rep. No. 109-338 (2006). Senate Committee on Environment and Public Works; Report: Great Lakes Coordination and Oversight Act of 2006.
59. Sept. 20, 2006; S. Rep. No. 109-339 (2006). Senate Committee on Environment and Public Works; Report: Tylersville Fish Hatchery Conveyance Act.
60. Sept. 20, 2006; S. Rep. No. 109-340 (2006). Senate Committee on Environment and Public Works; Report: North American Wetlands Conservation Reauthorization Act of 2006.
61. Sept. 20, 2006; S. Rep. No. 109-341 (2006). Senate Committee on Environment and Public Works; Report: Paint Bank and Wytheville National Fish Hatcheries Conveyance Act.
62. Sept. 20, 2006; Exec. Rpt. 109-19. (2006). Senate Committee on Foreign Relations; Report: Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland (Treaty Doc. 108-23).
63. Sept. 20, 2006; S. Rep. No. 109-342 (2006). Senate Committee on Indian Affairs; Report: Providing for Certain Lands To Be Held in Trust for the Utu Utu Gwaitu Paiute Tribe.
64. Sept. 20, 2006; S. Rep. No. 109-343 (2006). Senate Committee on Indian Affairs; Report: Cheyenne River Sioux Tribe Equitable Compensation Amendments Act of 2005.

65. Sept. 20, 2006; S. Rep. No. 109-344 (2006). Senate Committee on Indian Affairs; Report: Tribal Parity Act.
66. Sept. 19, 2006; H.R. Rep. No. 109-668 (2006). House Committee on Agriculture; Report: PIC and POPs Conventions and the LRTAP POPs Protocol Implementation Act.
67. Sept. 19, 2006; H.R. Rep. No. 109-666 (2006). House Committee on House Administration; Report: Federal Election Integrity Act of 2006.
68. Sept. 19, 2006; H.R. Rep. No. 109-665 (2006). House Committee on Resources; Report: Coral Reef Conservation Legacy Act of 2006.
69. Sept. 19, 2006; H.R. Rep. No. 109-670 (2006). House Committee on Rules; Report: Providing for Consideration of H.R. 4844, Federal Election Integrity Act of 2006.
70. Sept. 19, 2006; H.R. Rep. No. 109-667 (2006). House Committee on Transportation and Infrastructure; Report: MARPOL Annex VI Implementation Act of 2006.
71. Sept. 19, 2006; H.R. Rep. No. 109-669 (2006). House Committee on Transportation and Infrastructure; Report: Railroad Retirement Disability Earnings Act.
72. Sept. 19, 2006; S. Rep. No. 109-337 (2006). Senate Committee on Finance; Report: Elder Justice Act.
73. Sept. 15, 2006; H.R. Rep. No. 109-664, pt. 1 (2006). House Committee on Armed Services; Report: Amending Title 10, U.S. Code, To Authorize Trial by Military Commission for Violations of the Law of War.
74. Sept. 15, 2006; H.R. Rep. No. 109-663 (2006). House Committee on Judiciary; Report: To Enact Certain Laws Relating to Public Contracts As Title 41, U.S. Code, "Public Contracts."
75. Sept. 15, 2006; H.R. Rep. No. 109-600, pt. 2 (2006). House Committee on Judiciary; Report: Wright Amendment Reform Act.

76. Sept. 15, 2006; H.R. Rep. No. 109-661, pt. 1 (2006). House Committee on Resources; Report: Indian Health Care Improvement Act Amendments of 2006.
77. Sept. 15, 2006; H.R. Rep. No. 109-662 (2006). House Committee on Transportation and Infrastructure; Report: Public Transportation Security Assistance Act of 2006.
78. Sept. 15, 2006; S. Rep. No. 109-335 (2006). Senate Committee on Commerce, Science, and Transportation; Report: National Transportation Safety Board Reauthorization Act of 2006.
79. Sept. 15, 2006; S. Rep. No. 109-336 (2006). Senate Committee on Finance; Report: Telephone Excise Tax Repeal and Taxpayer Protection and Assistance Act of 2006.
80. Sept. 14, 2006; H.R. Rep. No. 109-659 (2006). House Committee on Energy and Commerce; Report: To Authorize Temporary Emergency Extensions to Certain Exemptions to the Requirements with Respect to Polychlorinated Biphenyls Under the Toxic Substances Control Act.
81. Sept. 14, 2006; H.R. Rep. No. 109-660 (2006). House Committee on Government Reform; Report: Regulation in Plain Language Act of 2006.
82. Sept. 14, 2006; H.R. Rep. No. 109-657 (2006). House Committee on Judiciary; Report: Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006.
83. Sept. 14, 2006; H.R. Rep. No. 109-656 (2006). House Committee on Judiciary; Report: Nondiscriminatory Taxation of Natural Gas Pipeline Property.
84. Sept. 14, 2006; H.R. Rep. No. 109-658 (2006). House Committee on Judiciary; Report: Private Property Rights Implementation Act of 2006.

85. Sept. 13, 2006; H.R. Rep. No. 109-652 (2006). House Committee on Government Reform; Report: Truth in Regulating Act Extension.
86. Sept. 13, 2006; H.R. Rep. No. 109-650 (2006). House Committee on Resources; Report: Restricting Indian Gaming to Homelands of Tribes Act of 2006.
87. Sept. 13, 2006; H.R. Rep. No. 109-653 (2006). House Committee on Rules; Report: Providing for Consideration of H.R. 6061, Secure Fence Act of 2006.
88. Sept. 13, 2006; H.R. Rep. No. 109-654 (2006). House Committee on Rules; Report: Providing for the Adoption of H. Res. 1000, Providing for Earmarking Reform in the House of Representatives.
89. Sept. 13, 2006; H.R. Rep. No. 109-655 (2006). House Committee on Rules; Report: Providing for Earmarking Reform in the House of Representatives.
90. Sept. 13, 2006; H.R. Rep. No. 109-651, pt. 1 (2006). House Committee on Veterans' Affairs; Report: Veterans Identity and Credit Security Act of 2006.
91. Sept. 13, 2006; S. Rep. No. 109-334 (2006). Senate Committee on Indian Affairs; Report: Lumbee Recognition Act.
92. Sept. 12, 2006; H.R. Rep. No. 109-649, pt. 1 (2006). House Committee on Financial Services; Report: Nonadmitted and Reinsurance Reform Act of 2006.
93. Sept. 12, 2006; H.R. Rep. No. 109-648, pt. 1 (2006). House Committee on Financial Services; Report: Financial Netting Improvements Act of 2006.
94. Sept. 12, 2006; H.R. Rep. No. 109-646 (2006). House Committee on Rules; Report: Providing for Consideration of H. Res. 994, Expressing the Sense of the House of Representatives on the Fifth Anniversary of the Terrorist Attacks Launched Against the U.S. on Sept. 11, 2001.

95. Sept. 12, 2006; H.R. Rep. No. 109-647 (2006). House Committee on Rules; Report: Providing for Consideration of H.R. 2965, Federal Prison Industries Competition in Contracting Act of 2006.
96. Sept. 11, 2006; S. Rep. No. 109-333 (2006). Senate Committee on Commerce, Science, and Transportation; Report: Expressing the Sense of Congress That States Should Require Candidates for Driver's Licenses To Demonstrate an Ability To Exercise Greatly Increased Caution When Driving in the Proximity of a Potentially Visually Impaired Individual.
97. Sept. 11, 2006; S. Rep. No. 109-332 (2006). Senate Committee on Homeland Security and Governmental Affairs; Report: Chemical Facility Anti-Terrorism Act of 2006.
98. Sept. 8, 2006; H.R. Rep. No. 109-644 (2006). House Committee on Energy and Commerce; Report: Wool Suit Fabric Labeling Fairness and International Standards Conforming Act.
99. Sept. 8, 2006; H.R. Rep. No. 109-645 (2006). House Committee on Financial Services; Report: FHA Multifamily Loan Limit Adjustment Act of 2006.
100. Sept. 8, 2006; H.R. Rep. No. 109-643 (2006). House Committee on Veterans' Affairs; Report: Department of Veterans Affairs Medical Facility Authorization Act of 2006.
101. Sept. 8, 2006; S. Rep. No. 109-330 (2006). Senate Select Committee on Intelligence; Report: Use by the Intelligence Community of Information Provided by the Iraqi National Congress.
102. Sept. 8, 2006; S. Rep. No. 109-331 (2006). Senate Select Committee on Intelligence; Report: Postwar Findings About Iraq's WMD Programs and Links to Terrorism and How They Compare with Prewar Assessments.

103.Sept. 8, 2006; S. Rep. No. 109-329 (2006). Senate Committee on Homeland Security and Governmental Affairs; Report: Federal Funding Accountability and Transparency Act of 2006.

Appendix E

ISSUES DISCUSSED ON THE FLOOR OF THE HOUSE OF REPRESENTATIVES AND THE SENATE DURING THE SIXTY DAYS PRIOR TO THE GENERAL ELECTION 2004 AND 2006

HOUSE OF REPRESENTATIVES – 2004*

Issues Discussed September 7, 150 Cong Rec. H6709-57 (Daily Ed. Sept. 7, 2004).

1. Report on H.R. 5006, Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2005
2. The Home-stretch Agenda
3. Hike in Medicare Premiums
4. Terror Attacks in Russia Part of Global War on Terror
5. U.S. Economy Keeps on Growing and Creating New Jobs
6. Weekly Award for Worst Example of Biased Liberal Media Report
7. Emergency Disaster Funds Necessary for Florida
8. Tropical Forest Conservation Act Reauthorization
9. Report on House Resolution 700, Directing the Attorney General to Transmit Documents in the Possession of the Attorney General Relating to Treatment of Prisoners and Detainees in Iraq, Afghanistan, and Guantanamo Bay
10. Announcement of Intention to Offer Motion to Instruct Conferees on H.R. 1308, Tax Relief, Simplification, and Equity Act of 2003

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*. The 2004 federal election occurred on November 2nd. Sixty days prior to the Federal Election Day was September 3rd. The following issues were discussed on the floor of the House of Representatives during that time. This list excludes renaming of buildings, recognizing honored individuals or groups, and extensions of remarks.

11. Emergency Supplemental Appropriations for Disaster Relief Act, 2004
12. Report on Resolution Providing for Consideration of H.R. 5006, Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2005
13. Saudi Arabia and Terrorism: the Painful Truth
14. Medicare Premium Increase Squeezes Seniors' Budgets
15. Honoring the First Responders of the Eleventh District of Georgia
16. Assault Weapons Ban must Not Expire
17. Smart Security and Elections
18. Breach of the Commitment to Medicare
19. Two Unfortunate National Records
20. Assault Weapons Ban Extension
21. Why the Capital Looks like a Bewildered City under Attack
22. To Modify the Generalized System of Preferences, and for Other Purposes--message from the President of the United States (H. Doc. No. 108-211)
23. Major Topics in this Fall's Election
24. The State of Our Economy

Issues Discussed September 8, 150 Cong. Rec. H6759-901 (Daily Ed. Sept. 8, 2004).1.

TV Affects Sexual Behavior of Teens
2. Disgraceful Statements by Vice President
3. Homeownership at an All-time High
4. Provide Protection Before Disasters Occur
5. President an Outstanding Leader in War on Terror
6. The Economy, Unemployment, and Medicare Premiums
7. Being less Critical of the President
8. Expressing Alarm about America's Shrinking Fleet
9. Demanding the Truth

10. 2005 Republican Freedom Calendar Celebrating the 150th Anniversary of Republican Party
11. Bush Economic Policies Not Working
12. Election of Member to Committee on Armed Services
13. Economy Suffering under Bush Administration
14. Bush Administration under Funds Homeland Security
15. Heartfelt Sympathy and Condolences for Russia
16. Politics of Hope Versus Politics of Fear for America
17. Expressing Indignation Resulting from Comments of Vice President
18. Are We Safer Now than 4 Years Ago?
19. Outrage over Increase in Medicare Part B Premiums
20. Loss of Soldiers' Lives
21. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2005
22. Making in Order at Any Time Consideration of House Resolution 757, Expressing Sense of the House on Anniversary of Terrorist Attacks Launched Against United States on September 11, 2001
23. Report on H.R. 5025, Departments of Transportation and Treasury and Independent Agencies Appropriations Act, 2005
24. Motion to Instruct Conferees on H.R. 1308, Tax Relief, Simplification, and Equity Act of 2003
25. Garrett Lee Smith Memorial Act
26. Resignation as Member of Committee on Government Reform
27. Resignation as Member and Appointment of Member to Permanent Select Committee on Intelligence
28. Resignation as Chairman and Appointment of Chairman to Permanent Select Committee on Intelligence
29. Child Medication Safety Act
30. The President's Economic Policy
31. Smart Security and Elections

32. Court Ruling Upholds Barbaric and Brutal Practice of Partial-birth Abortion
33. Democracy Not Prevailing with Regard to Overtime Regulations
34. Important Victory for People of Nevada Regarding Yucca Mountain
35. Expiration of Assault Weapons Ban
36. Suicide Bombings in Israel and Syria's Harboring of Hamas
37. Local School Districts Not Receiving Federal Funding
38. Remembering September 11, 2001
39. Social Security and the Budget
40. Iraq Watch

Issues Discussed September 9, 150 Cong. Rec. H6903-98 (Daily Ed. Sept. 9, 2004).

1. Welcoming the Reverend David O. Jones
2. Saluting the Lamar Little League All-stars
3. Rise in Medicare Premiums Catastrophic Event for Seniors
4. Expressing Outrage at Increase in Medicare Premiums
5. Remembering September 11
6. Extend the Assault Weapons Ban
7. Guaranteeing a Brighter Future by Prevailing in the War on Terror
8. Introducing H.R. 5038, the American Heroes Act
9. Missing Classmates
10. Assault Weapons Ban Should Not Be Allowed to Expire
11. Rising Health Care Costs
12. Misconceptions about Iraq
13. So-called Economic Recovery
14. 9/11 Commission Recommendations
15. Bush Economic Policies Are Bad for Average Americans

16. Expressing Sense of the House on Anniversary of Terrorist Attacks Launched Against United States on September 11, 2001
17. Moment of Silence Commemorating the 9/11 Attacks
18. Motion to Instruct Conferees on H.R. 1308, Tax Relief, Simplification, and Equity Act of 2003
19. Garrett Lee Smith Memorial Act
20. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2005
21. Report on H.R. 5041, Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2005
22. Election of Member to Committee on Agriculture and Committee on Transportation and Infrastructure
23. Restoring Freedom of Speech to America's Houses of Worship
24. Smart Security and the Global War on Terror
25. Those Who Have Borne the Battle
26. Increase in the Monthly Medicare Part B Premium
27. Status Report on Current Spending Levels of On-budget Spending and Revenues for FY 2004 and the 5-year Period FY 2005 Through FY 2009
28. Omission from the Congressional Record of Wednesday, September 8, 2004, at Page H6850

Issues Discussed September 13, 150 Cong. Rec. H6999-7074 (Daily Ed. Sept. 13, 2004).

1. Mission Accomplished for Republicans and Their Special Interests
2. The War on Terror
3. New Overtime Rules Threaten Pay Cut to Middle Class Families

4. Continuation of the National Emergency with Respect to Certain Terrorist Attacks--message from the President of the United States (H. Doc. No. 108-212)
5. Expressing Grave Concern of Congress Regarding Continuing Gross Violations of Human Rights and Civil Liberties of Syrian People by Government of Syrian Arab Republic
6. Expressing Support for Freedom in Hong Kong
7. Condemning Terrorist Attacks Against Russian Federation
8. National Archives and Records Administration Efficiency Act of 2004
9. Castillo De San Marcos National Monument Preservation and Education Act
10. Availability of NOAA Real Property on Virginia Key, Florida
11. Wilson's Creek National Battlefield Boundary Adjustment Act of 2004
12. Clarifying Boundaries of John H. Chafee Coast Barrier Resources System
13. Harpers Ferry National Historical Park Boundary Revision Act of 2004
14. Amending the Organic Act of Guam
15. Providing for Temporary Extension of Programs under Small Business Act and Small Business Investment Act of 1958
16. Expressing Gratitude to Cities of Boston, Massachusetts, and New York City, New York, for Hosting 2004 National Political Conventions
17. Oncologists Give Congress Bad News
18. U.S. Economy Is in a Mess
19. Honoring California's 2004 Olympians
20. Iraq and Domestic Violence
21. Assault Weapons Ban Expires

22. Congress Commits Shameful Act of Omission
23. Facts Speak for Themselves on Medicare Reform
24. Split Personality
25. Florida Weathers the Storms
26. H. Res. 717, Recognizing 58th Birthday of William Jefferson Clinton
27. The Republicans' Cozy Relationship with Corporate Interests
28. Report on Resolution Providing for Consideration of H.R. 4571, Lawsuit Abuse Reduction Act of 2004
29. Hurricane Season
30. Iraq Watch
31. The Face of the Terrorist Foe

Issues Discussed September 14, 150 Cong. Rec. H7075-138 (Daily Ed. Sept. 14, 2005).

1. Ending Lawsuit Abuse
2. Proposing a Temporary Memorial in the Capitol Rotunda
3. Drug Impaired Driving Enforcement Act of 2004
4. Two Questions for Dan Rather
5. Support New Transportation Funding
6. Terror Attacks on Australia Will Not Deter War on Terror
7. In Support of Drug Reimportation
8. The President's Budget Record
9. EBay Part of 21st Century Economy
10. The Republicans Have Lost Their Way
11. Constitution Restoration Act Promises Freedom of Religion
12. America Needs a Leadership Transplant
13. The 150th Anniversary of the Republican Party
14. Bush Proposals
15. Providing for Consideration of H.R. 4571, Lawsuit Abuse Reduction Act of 2004
16. Nonprofit Athletic Organization Protection Act of 2003

17. Good Samaritan Volunteer Firefighter Assistance Act of 2004
18. Volunteer Pilot Organization Protection Act of 2004
19. Good Samaritan Volunteer Firefighter Assistance Act of 2003
20. Volunteer Pilot Organization Protection Act of 2004
21. Transportation, Treasury, and Independent Agencies Appropriations Act, 2005
22. Transportation, Treasury, and Independent Agencies Appropriations Act, 2005
23. The American Soldiers in Iraq
24. War on Terror
25. The President's Playbook: Denial, Disinformation, and Dodging Responsibility
26. Drought Relief
27. An American Story
28. Good Friday Peace Accords
29. Drought and Fire in Our Nation's Forests

Issues Discussed September 15, 150 Cong. Rec. H7193-235 (Daily. Ed. Sept. 15, 2004).

1. Urging the President to Speak Candidly
2. Introduction of Constitutional Amendment Allowing Naturalized Citizens to Serve as President
3. Ivan Threatens New Orleans
4. Against Matricula Consular Cards
5. Washington Results Bode Well for Democrats
6. NBC Gets Media Bias Award
7. In Praise of North Carolina Senator John Edwards
8. Lawsuit Abuse Reduction Act
9. The National Debt
10. Transportation, Treasury, and Independent Agencies Appropriations Act, 2005

11. Amending Limitation on Amendments During Further Consideration of H.R. 5025, Departments of Transportation and Treasury and Independent Agencies Appropriations Act
12. Congress Bests Lobbyists Once Again in Charity Basketball Game
13. Expressing Thanks of the House to American POW/MIAs on National POW/MIA Recognition Day
14. Federal Disaster Help for Hurricane Victims
15. Rio Grand Forest Products in Espanola, New Mexico
16. The Greatest Danger: Iran's Pursuit of Nuclear Weapons
17. Shocking Evidence Regarding Former U.S. Presidents
18. Smart Security
19. Freedom of Speech for Our Churches
20. Shameful Medicare Increase
21. The Essence of Science
22. Tort Reform
23. Science Policy/Stem Cell Research
24. Americans Need the Right to Vote

Issues Discussed September 17, 150 Cong. Rec. H7237-45 (Daily Ed. Sept. 17, 2004)

1. The Situation in Iraq
2. House Bills and Joint Resolutions Approved by the President
3. Senate Bills and Joint Resolution Approved by the President

Issues Discussed September 21, 150 Cong. Rec. H7247-330 (Daily Ed. Sept. 21, 2004).

1. Ten Years
2. Securing the Nation's Borders
3. The Bush Medicare Bill's Dirty Laundry
4. Stenholm Debt Limit Amendment to Treasury Transportation Appropriations Bill
5. Opening of the National Museum of the American Indian
6. Media Bias
7. Opening of the National Museum of the American Indian

8. Rightful Place of Honor of the First Americans Is Realized
9. Federal Law Enforcement Training Center Training Flight Deck Officers in the Use of Firearms
10. Termination of Emergency Declared in Executive Order 12543 with Respect to Libya--message from the President of the United States (H. Doc. No. 108-216)
11. Appointment as Member to House Library of Congress Trust Fund Board
12. Llagas Reclamation Groundwater Remediation Initiative
13. Castle Nugent Farms, St. Croix, Virgin Islands, National Park Feasibility Study
14. Right-to-Ride Livestock on Federal Lands Act of 2004
15. Riverside-Corona Feeder Authorization Act
16. Western Reserve Heritage Areas Study Act
17. Railroad Right-of-way Conveyance Validation Act of 2003
18. Intellectual Property Protection and Courts Amendments Act of 2004
19. Video Voyeurism Prevention Act of 2003
20. Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism–Message from the President of the United States (H. Doc. No. 108-217)
21. Transportation, Treasury, and Independent Agencies Appropriations Act, 2005
22. Announcement of Intention to Offer Motion to Instruct Conferees on H.R. 1308, Tax Relief, Simplification, and Equity Act of 2003
23. Report on Resolution Providing for Consideration of H.R. 2028, Pledge Protection Act of 2004
24. Unscrupulous Tactics on Military Bases
25. Three Trillion Is a Big Number
26. President Bush Visits Ohio Again

27. Degradation of the Democratic Process
28. Tennessee's Economy and Health Savings Accounts
29. Smart Security and Iraq
30. Expressing Outrage at Republican Double Standard
31. Medicare Part B Premiums to Increase 17 Percent
32. Administration Launches New Campaign
33. Record Deficits Abound
34. Our Troops in Iraq
35. Congressional Black Caucus and the Pending Election
36. Big Trouble Lies Ahead

Issues Discussed September 22, 150 Cong. Rec. H7331-7444 (Daily Ed. Sept. 22, 2004).

1. Fulfilling America's Promise
2. Democratic Partnership with the American People
3. Ten-year Anniversary of the GOP House Majority
4. Republican Party in Breach of Contract
5. Democrats Offer a Different Vision
6. Democrats Unveil New Partnership for America's Future
7. Joe Lockhart Should Leave the Kerry Campaign
8. War in Iraq Is Costing U.S. Lives and Domestic Programs
9. House Republicans: a Proud and Positive 10-year Record of Achievement
10. Support the Pledge
11. Republican Majority and Family Health Care
12. The Record of the Republican-controlled Congress
13. The Republican Party's Consistent Support for the Military
14. Snowflakes Embryo Adoption
15. The Sudan
16. Time for a New Partnership
17. To Celebrate America
18. The Republican Contract with America
19. Transportation, Treasury, and Independent Agencies Appropriations Act, 2005

20. Civil War Sesquicentennial Commission Act
21. Hudson-Fulton-Champlain 400th Commemoration Commission Act of 2004
22. Supporting the Goals and Ideals of National Preparedness Month
23. Supporting the Goals and Ideals of National Long-term Care Residents' Rights Week
24. Expressing the Sense of Congress That the President Should Designate September 11 as a National Day of Voluntary Service, Charity, and Compassion
25. Recognizing Outstanding Efforts of Individuals and Communities Who Volunteered or Donated Items to North Platte Canteen During World War Ii
26. Recognizing and Honoring Military Unit Family Support Volunteers
27. Commending the National Oceanic and Atmospheric Administration and its Employees for its Dedication and Hard Work During Hurricanes Charley and Frances
28. The Adoption Tax Relief Guarantee Act
29. Calling for the Suspension of Sudan's Membership on the United Nations Commission on Human Rights
30. Condemning Terrorist Attack in Jakarta, Indonesia, on September 9, 2004
31. Encouraging International Olympic Committee to Select New York City as Site of 2012 Olympic Games
32. Supporting Goals and Purposes of National Farm Safety and Health Week
33. Pine Springs Land Exchange Act
34. Mokelumne River Feasibility Study
35. Creating Office of Chief Financial Officer of the Government of the Virgin Islands
36. Motion to Instruct Conferees on H.R. 1308, Tax Relief, Simplification, and Equity Act of 2003

37. President Pervez Musharraf of Pakistan to Visit Congress
38. Dust Clouds; No Rain
39. Special Tribute for American Heroes
40. A Prominent Politician's Plan for Iraq
41. War Means Sacrifice
42. Terrorism Around the World
43. Ukrainian Presidential Candidate Poisoned
44. Defending Freedom and Democracy
45. New Partnership for America's Future
46. Iraq Watch
47. Emotional Trip to Russia

Issues Discussed September 23, 150 Cong. Rec. H7445-575 (Daily Ed. Sept. 23, 2004).

1. Joint Meeting of the House and Senate to Hear an Address by His Excellency Ayad Allawi, Interim Prime Minister of the Republic of Iraq
2. Address by His Excellency Ayad Allawi, Interim Prime Minister of the Republic of Iraq
3. Partnership with America's Future
4. Misery Index Low; Prosperity Index High
5. New Blueprint for the Future
6. Success in Iraq
7. National Sales Tax Proposal Just Another Tax Cut for the Rich
8. Keeping the Promises of the Contract with America
9. The Need to Appoint House Conferees to Defense Authorization Bill
10. 215th Birthday of the U.S. Marshals Service
11. Be Afraid
12. Republican Party 150th Anniversary Celebratory Freedom Calendar
13. Wind Production Tax Credit Extension
14. Outrageous Sales Tax

15. Pledge Protection Act of 2004
16. The Adoption Tax Relief Guarantee Act
17. Conference Report on H.R. 1308, Working Families Tax Relief Act of 2004
18. Privileged Report Requesting President to Provide Certain Information to House of Representatives Respecting National Energy Policy Development Group
19. Sticking it to Working Families
20. Helping American Families
21. Need to Work in a Bipartisan Manner
22. Smart Security and Energy and Water Appropriations
23. The Constitution
24. Patents and Nanotechnology
25. Exchange of Special Order Time
26. Accepting the Truth of International Alliances
27. Nation Headed in Wrong Direction for Jobs and Economy
28. Fiscal Danger
29. Worldwide Terrorism
30. Medicare Premiums Increase Finances to Hmos and Drug Companies
31. Follow-up to Remarks Given to Congress by Iraqi Interim Prime Minister Ayad Allawi: Question to the Administration--where Is the Plan?
32. National Affordable Housing Construction Program
33. The Fair Tax
34. Elections: the U.S. and Iraq
35. Support Our Commander in Chief and Troops

Issues Discussed September 24, 150 Cong. Rec. H7577-80 (Daily Ed. Sept. 24, 2004).

1. Memorials

Issues Discussed September 28, 150 Cong. Rec. H7581-736 (Daily Ed. Sept. 28, 2004).

1. Clean Water and Sanitation Resolution

2. Hard Challenges Facing the Nation
3. Buyout and FDA
4. Iraqi Elections must Go Forward
5. Little Safety in Baghdad
6. Free Elections for Iraq
7. Disarray on Iraq
8. Remembering New Mexico's War Dead
9. Applauding Congressional Conference on Civic Education
10. Reports Discovered on Iraq
11. Poll Finds Media Bias
12. Health Care Costs
13. Freedom of Speech in the Pulpit
14. Revising and Extending Boys and Girls Clubs of America
15. Title 46 Codification Act of 2004
16. Piracy Deterrence and Education Act of 2004
17. Expressing Continued Support for Construction of Victims of Communism Memorial
18. Rancho El Cajon Boundary Reconciliation Act
19. Chickasaw National Recreation Area Land Exchange Act of 2004
20. Angel Island Immigration Station Restoration and Preservation Act
21. Truman Farm Home Expansion Act
22. Eastern Washington University Land Transfer Authorization Extension
23. Gullah/geechee Cultural Heritage Act
24. Land Exchange Involving Private and Public Land in Vicinity of Holloman Air Force Base, New Mexico
25. Hibben Center Act
26. Manhattan Project National Historical Park Study Act
27. El Camino Real De Los Tejas National Historic Trail Act
28. Trail Responsibility and Accountability for the Improvement of Lands Act

29. Small Tracts Act Amendments
30. Mcinnis Canyons National Conservation Area
31. Healthy Forest Youth Conservation Corps Act of 2004
32. New Hope Cemetery Association Land Conveyance
33. Craig Recreation Land Purchase Act
34. Arapaho and Roosevelt National Forests Land Exchange Act of 2004
35. Little Butte/bear Creek Subbasins Water Feasibility Act
36. Authorizing Feasibility Study on Alder Creek Water Storage and Conservation Project
37. Southern California Groundwater Remediation Act
38. Montana Water Contracts Extension Act of 2004
39. Ainsworth Unit, Nebraska Water Contract Extension
40. Lake Nighthorse Redesignation Act
41. Recognizing 60th Anniversary of Battle of Peleliu
42. Recognizing 60th Anniversary of Liberation of Guam During World War Ii
43. Colorado River Indian Reservation Boundary Correction Act
44. Brown Tree Snake Control and Eradication Act of 2004
45. Appointment of Conferees on H.R. 4200, National Defense Authorization Act for Fiscal Year 2005
46. Authorizing Printing of Commemorative Document in Memory of President Ronald Wilson Reagan
47. Amending Congressional Accountability Act to Permit Second Term for Board of Directors of Office of Compliance
48. Motion to Instruct Conferees on H.R. 4200, National Defense Authorization Act for Fiscal Year 2005
49. Revising and Extending Boys and Girls Clubs of America
50. Commending Resiliency of People of the State of Florida and Work of Individuals Who Assisted with Recovery Efforts after Hurricanes Charley, Frances, and Ivan

51. Report on Resolution Providing for Consideration of H.j. Res. 106, Proposing an Amendment to the Constitution of the United States Relating to Marriage
52. Report on Resolution Providing for Consideration of H.j. Res. 107, Making Continuing Appropriations for the Fiscal Year 2005
53. Report on Resolution Providing for Consideration of H.R. 3193, District of Columbia Personal Protection Act
54. District of Columbia Retirement Protection Improvement Act of 2004
55. Expressing the Sense of Congress Regarding the Importance of Life Insurance, and Recognizing and Supporting National Life Insurance Awareness Month
56. Assault Weapons Ban
57. Prosecuting Global War on Terror
58. Threats Made by Azerbaijan Against Armenia
59. Translation Backlog
60. Smart Security and Iraq
61. Exchange of Special Order
62. War on Terror
63. Medicare
64. 9/11 Commission Recommendations
65. Iraq

Issues Discussed September 29, 150 Cong. Rec. H 7737-864 (Daily Ed. Sept. 29, 2004).

1. The War on Terror
2. The Situation in Iraq Is Getting Worse
3. Recognizing the Century Council and Nickelodeon
4. The War in Iraq
5. In Support of the District of Columbia Personal Protection Act
6. Consistently Wrong on Iraq
7. Indonesia Holds First National Presidential Election

8. Provide Adequate Humanitarian Assistance to the Caribbean
9. Marking 150th Anniversary of Founding of Republican Party
10. America's Priorities in Suspended Animation
11. Opposition to Relaxing Gun Control Laws in the District of Columbia
12. Administration Unhinged from Reality
13. America Not Being Made Safer
14. Providing for Consideration of H.j. Res. 107, Continuing Appropriations for Fiscal Year 2005
15. Stand up for the Sanctity of Marriage
16. Appointment of Conferees on H.R. 4520, American Jobs Creation Act of 2004
17. District of Columbia Personal Protection Act
18. Motion to Instruct Conferees on H.R. 4520, American Jobs Creation Act of 2004
19. Continuing Appropriations for Fiscal Year 2005
20. Welfare Reform Extension Act, Part VIII
21. Veterans Health Programs and Facilities Enhancement Act of 2004
22. Department of Veterans Affairs Nurse Recruitment and Retention Act of 2004
23. National Estuary Program Reauthorization
24. Authorizing Board of Regents of Smithsonian Institution to Carry out Construction and Related Activities in Support of Veritas on Kitt Peak
25. Encouraging Progress in Iraq
26. Smart Security and Iraq
27. The Judges of Madison County
28. The Need for More Research and Management of Risk of Accutane
29. Suppressing the Cost Estimate
30. Important Strategies for Fighting the War on Terror
31. The National Economy

32. Iraq Watch

Issues Discussed September 30, 150 Cong. Rec. H7865-945 (Daily Ed. Sept. 30, 2004).

1. Hope in Iraq
2. America Needs Commander in Chief, Not Cheerleader in Chief
3. Marriage Protection Amendment
4. Ruben Martinez Awarded MacArthur Fellowship
5. Global Warming
6. Cheney Had it Right First Time
7. Historic Meeting Between India and Pakistan Leaders Offers Hope
8. Tonight's Presidential Debate
9. Drought Relief
10. Iraq
11. Surface Transportation Extension Act of 2004, Part V
12. Welfare Reform Extension Act, Part Viii
13. Department of Veterans Affairs Nurse Recruitment and Retention Act of 2004
14. Announcement by Committee on Rules Regarding Amendments to S. 878, Additional Permanent Judgeship in the District of Idaho
15. Global Warming
16. Smart Security and Global Change
17. Judges of Madison County, Part 2
18. Accutane's Impact on Brain
19. Truth about Iraq
20. 9/11 Commission Legislation

Issues Discussed October 4, 150 Cong. Rec. H7947-8039 (Daily Ed. Oct. 4, 2004).

1. H.R. 10 Will Improve Homeland Security
2. Appointment to Commission on Abraham Lincoln Study Abroad Fellowship Program

3. Appointment as Members to Commission on Systemic Interoperability
4. Reappointment to Advisory Committee on Student Financial Assistance for 3-year Term
5. Petrified Forest National Park Expansion Act of 2004
6. Taunton, Massachusetts Special Resources Study Act
7. Resolution of Boundary Encroachment on Land of Union Pacific Railroad Company in Tipton, California
8. Recognizing That November 2, 2003, Shall Be Dedicated to ``A Tribute to Survivors'' at the United States Holocaust Memorial Museum
9. Tapoco Project Licensing Act of 2004
10. Edward H. Mcdaniel American Legion Post No. 22 Land Conveyance Act
11. Lincoln County Conservation, Recreation, and Development Act of 2004
12. Authorizing Secretary of the Interior to Participate in Brownsville Public Utility Board Water Recycling and Desalinization Project
13. Provo River Project Transfer Act
14. Authorizing Secretary of the Interior for Construction of Lower Santa Margarita Conjunctive Use Project
15. Conveyance of Certain Land Held in Trust for the Paiute Indian Tribe of Utah to the City of Richfield, Ut
16. Alaska Native Allotment Subdivision Act
17. Noxious Weed Control and Eradication Act of 2004
18. Transferring Federal Lands Between Secretary of Agriculture and Secretary of Interior
19. Southern Ute and Colorado Intergovernmental Agreement Implementation Act of 2003
20. North Korean Human Rights Act of 2004

21. Urging Government of Ukraine to Ensure Democratic, Transparent, and Fair Elections Process for Presidential Election on October 31, 2004
22. Report on Resolution Providing for Consideration of S. 878, Creating Additional Federal Court Judgeships
23. Belarus Democracy Act of 2004
24. Expressing Sense of Congress Regarding Oppression by China of Falun Gong in United States and China
25. Sense of Congress Regarding Humanitarian Assistance to Countries of Caribbean Devastated by Hurricanes Charley, Frances, Ivan, and Jeanne
26. The Judges of Madison County, Part Three
27. Smart Security and Disabled Veterans
28. Stem Cell Research
29. Great Victory for Farm Labor Organizing Committee in Reaching Labor Agreement
30. U.S. Foreign Policy Plagued with Attention Deficit Disorder
31. The Truth about the Medicare Modernization Act
32. The National Debt
33. To Cast Aside a Friend
34. Iraq Watch

Issues Discussed October 5, 150 Cong. Rec. H8041-170 (Daily Ed. Oct. 5, 2004).

1. The Global Test Is a Miserable Failure
2. In November, Americans Have a Chance to Trade George Bush
3. Help Promote Healthy Lifestyles in America
4. Republican House Bribery
5. President Bush Is the Right Leader in the War on Terror
6. Health Care Costs
7. Lost Public Trust
8. Crystal-clear Choices

9. 150th Anniversary of Founding of Republican Party
10. Are You Better Off--health Care
11. Appointment of Conferees on H.R. 4850, District of Columbia Appropriations Act, 2005
12. Creating Additional Federal Court Judgeships
13. Recognizing Spirit of Jacob Mock Doub and Expressing Sense of Congress That ``National Take a Kid Mountain Biking Day" Should Be Established in Jacob Mock Doub's Honor
14. Patient Navigator Outreach and Chronic Disease Prevention Act of 2004
15. National All Schedules Prescription Electronic Reporting Act of 2004
16. Pancreatic Islet Cell Transplantation Act of 2004
17. Asthmatic Schoolchildren's Treatment and Health Management Act of 2004
18. Mammography Quality Standards Reauthorization Act of 2004
19. Securely Protect Yourself Against Cyber Trespass Act
20. Recognizing Community Organization of Public Access Defibrillation Programs
21. Expressing Sense of Congress That Private Health Insurance Companies Should Take a Proactive Role in Promoting Healthy Lifestyles
22. Safe and Timely Interstate Placement of Foster Children Act of 2004
23. Sense of Congress Recognizing Contributions of Seven *Columbia* Astronauts
24. Military Personnel Financial Services Protection Act
25. Confirming Authority of Secretary of Agriculture and Commodity Credit Corporation to Enter into Memorandums of Understanding Regarding Collection of Approved Commodity Assessments from Proceeds of Marketing Assistance Loans

26. Providing for National Plan for Control and Management of Sudden Oak Death
27. Pennsylvania National Forest Improvement Act of 2004
28. Universal National Service Act of 2003
29. Agricultural Adjustment Act Amendment
30. Expressing Support of House for Organizations Providing Emergency Food Assistance
31. Recognizing the Establishment of Hunters for the Hungry Programs Across the U.S.
32. Amending the Department of Agriculture Organic Act of 1944 to Ensure That Dependents of Employees of the Forest Service Stationed in Puerto Rico Receive High-quality Elementary and Secondary Education
33. Authorizing the Secretary of Agriculture to Sell or Exchange Certain Administrative Sites in the Ozark-St. Francis and Ouachita National Forests
34. Providing for the Use by the State of North Carolina of Federal Lands at the Oxford Research Station in Granville County, North Carolina
35. Health Care
36. Democrat Nominee for President Continues to Debate with Himself
37. Health Care
38. Social Security
39. Conference Report on H.R. 4850, District of Columbia Appropriations Act, 2005
40. Pandora's Box
41. Link Between Saddam Hussein and Attack on United States
42. Report on Resolution Providing for Consideration of H.R. 5212, Emergency Supplemental Appropriations, Fiscal Year 2005, for Additional Disaster Assistance Relating to Storm Damage

43. Report on Resolution Providing for Consideration of H.R. 5107, Justice for All Act of 2004
Issues Discussed October 6, 150 Cong. Rec. H8171-8410 (Daily Ed. Oct. 6, 2004).
1. Ensuring Fair and Free Elections in Belarus
2. Congratulating Senator John Edwards for Successful Debate
3. Kerry Does Not Get it on Iraq
4. Administration must Admit Mistakes
5. President Bush Has a Record of Leadership
6. Now Is Not the Time to Cut Veterans' Benefits
7. Republican Rhetoric Does Not Match Reality
8. Failing Economic Health of Our Nation
9. 150th Anniversary of the Republican Party
10. Large Civil Aircraft Agreement
11. Are We Better off
12. Bad Memory
13. The Right Thing to Do
14. Aid for Haiti
15. Florida Voter Suppression
16. Mental Health Awareness Week
17. Disaster Relief
18. Iraqi Arms Threat
19. Ready for Change
20. Justice for All Act of 2004
21. Conference Report on H.R. 4850, District of Columbia Appropriations Act, 2005
22. Satellite Home Viewer Extension and Reauthorization Act of 2004
23. Water Supply, Reliability, and Environmental Improvement Act
24. Improvements to Employment Verification System under Immigration and Nationality Act
25. Access to Rural Physicians Improvement Act of 2004

26. Mentally Ill Offender Treatment and Crime Reduction Act of 2004
27. Extending Authority of Supreme Court Police, Modifying Venue of Prosecutions Relating to Supreme Court Building and Grounds, and Authorizing Acceptance of Gifts to United States Supreme Court
28. 40th Anniversary of Sixteenth Street Baptist Church Bombing
29. Internet Spyware (I-Spy) Prevention Act of 2004
30. Amending Section 340e of Public Health Service Act Relating to Children's Hospitals
31. Research Review Act of 2004
32. District of Columbia Mental Health Civil Commitment Modernization Act of 2004
33. Federal Workforce Flexibility Act of 2003
34. Emergency Supplemental Appropriations for Hurricane Disasters Assistance Act, 2005
35. Special Olympics Sport and Empowerment Act of 2004
36. Higher Education Extension Act of 2004
37. Taxpayer-teacher Protection Act of 2004
38. Supporting Efforts to Promote Awareness of Effective Runaway Youth Prevention Programs
39. Sense of Congress Regarding Student Travel
40. Lights on Afterschool
41. Amending Congressional Accountability Act to Permit Second Term for Board of Directors of Office of Compliance
42. Recognizing and Supporting Efforts to Promote Greater Civic Awareness among People of United States
43. Lake Pontchartrain Restoration Program Authorization
44. Tijuana River Valley Estuary and Beach Sewage Cleanup Act of 2000 Amendment
45. Norman Y. Mineta Research and Special Programs Improvement Act

46. Economic Development Administration Reauthorization Act of 2004
47. Amending the Lease Lot Conveyance Act of 2002 to Provide That Amounts Received by the United States under That Act Shall Be Deposited in the Reclamation Fund
48. Chimayo Water Supply System and Espanola Filtration Facility Act of 2004
49. National Park System Laws Technical Amendments Act of 2004
50. Northern Rio Grande National Heritage Area Act
51. American Indian Probate Reform Act of 2004
52. Congratulating Mojave Aerospace Venture for Winning the Ansari X Prize
53. Specialty Crops Competitiveness Act of 2004
54. Homeless Veterans Assistance Act of 2004
55. Servicemembers and Veterans Legal Protections Act of 2004
56. Congratulating and Commending the Veterans of Foreign Wars
57. Expressing Sense of Congress That a Minute of Silence Should Be Observed Annually on Veterans Day
58. Comprehensive Peace in Sudan Act
59. Celebrating 50th Anniversary of Falcon International Dam
60. Condemning Abduction of Dylan Benwell
61. Calling on the United Nations Security Council to Immediately Consider and Take Appropriate Action
62. Report on Resolution Providing for Consideration of H.R. 10, 9/11 Recommendations Implementation Act

Issues Discussed October 7, 150 Cong. Rec. H8411-859 (Daily Ed. Oct. 7, 2004).

1. Suing Their Way to the White House
2. Bad Choices Make America less Safe
3. Troops Vote for Bush

4. Recognizing National Mental Illness Awareness Week
5. Border Security Infrastructure
6. Homeland Security Should Bring Unity in House
7. Americans Misled
8. Change Is Needed
9. CBS' Media Bias
10. The Truth Will Set You Free
11. Day of Reckoning
12. Sugar Reform Caucus
13. Weapons of Mass Destruction Report
14. Administration must Admit Mistakes
15. Times When War Is the Only Option
16. Sanctioning Iran
17. Appointment of Conferees on H.R. 4567, Department of Homeland Security Appropriations Act, 2005
18. Internet Spyware (I-Spy) Prevention Act of 2004
19. Research Review Act of 2004
20. Taxpayer-teacher Protection Act of 2004
21. Privileged Report on H. Res. 776, Inquiry Requesting the President and Directing Secretary of Health and Human Services Provide Certain Documents Relating to Estimates and Analyses of Cost of Medicare Prescription Drug Legislation
22. Conference Report on H.R. 4520, American Jobs Creation Act of 2004
23. Economic Development Administration Reauthorization Act of 2004
24. Comprehensive Peace in Sudan Act
25. 9/11 Recommendations Implementation Act
26. Appointment of Conferees on H.R. 4837, Military Construction Appropriations Act, 2005
27. Appointment as Member to Commission on International Religious Freedom
28. Honoring the Fallen of the USS ``Cole"

Issues Discussed October 8, 150 Cong. Rec. H8861-9683 (Daily Ed. Oct. 8, 2004).

1. Unethical Republican House
2. Our Terrorist Enemies Are Afoot
3. Fog of War Has Set in
4. John Kerry's Handout to the Rich
5. Ethical Cloud over House Grows Darker
6. Arkansas National Guard Celebrates 200th Anniversary
7. Experts Prove Hussein Was a Threat
8. Change Is Coming
9. 9/11 Recommendations Implementation Act
10. Conference Report on H.R. 4200, Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005
11. Motion to Instruct Conferees on S. 2845, National Intelligence Reform Act of 2004
12. Privileges of the House--Special Counsel to Investigate Actions of Republican Majority Leader
13. Authorizing Illumination of Gateway Arch in Honor of Breast Cancer Awareness Month
14. Fort Donelson National Battlefield Expansion Act of 2004
15. State Justice Institute Reauthorization Act of 2004
16. Prevention of Child Abduction Partnership Act
17. Anabolic Steroid Control Act of 2004
18. Federal Regulatory Improvement Act of 2004
19. Family Farmer Bankruptcy Relief Act of 2004
20. Assistive Technology Act of 2004
21. Appointment of Conferees on H.R. 1350, Improving Education Results for Children with Disabilities Act of 2003
22. Extending Liability Indemnification Regime for Commercial Space Transportation Industry
23. National Earthquake Hazards Reduction Program Reauthorization Act of 2004

24. Amending the Securities Laws to Permit Church Pension Plans to Be Invested in Collective Trusts
25. Privileged Report Requesting the President and the Secretary of Health and Human Services Provide Certain Documents Relating to the Medicare Prescription Drug Legislation
26. Modifying and Extending Certain Privatization Requirements of the Communications Satellite Act of 1962
27. John F. Kennedy Center Reauthorization Act of 2004
28. Veterans' Compensation Cost-of-living Adjustment Act of 2004
29. Global Anti-Semitism Review Act of 2004
30. Resolution of the Ethiopia-Eritrea Border Dispute Act of 2003
31. Conference Report on H.R. 1047, Miscellaneous Trade and Technical Corrections Act of 2004
32. Federal Employees Dental and Vision Benefits Enhancement Act of 2004
33. Memorials

Issues Discussed October 9, 150 Cong. Rec. H9053-9186 (Daily Ed. Oct. 9, 2004).

1. President Bush Promotes Job Growth
2. New Economic Policy for America
3. President Fated to Strike out
4. Many Disappointed with President's Use of Power
5. Republicans Strip Hate Crime Prevention Provisions from Defense Authorization Bill
6. Senator Kerry Stumbles Badly on Stem Cells Research
7. Pretty Pathetic
8. Conference Report on H.R. 4837, Military Construction Appropriations Act, 2005
9. Conference Report on H.R. 4567, Department of Homeland Security Appropriations Act, 2005

10. Conference Report on H.R. 4200, Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005
11. Correcting Enrollment of H.R. 5107, Justice for All Act of 2004
12. Smart Security and the ``Backdoor Draft"
13. Judicial Activism
14. Elections in Afghanistan
15. Remembering Those Defending America's Freedom

UNITED STATES SENATE – 2004*

Issues Discussed September 7, 2004, 150 Cong. Rec. S8811-8924 (daily ed. Sept. 7, 2004).

1. Making the 9/11 Commission's Recommendations Law
2. Passing an Energy Bill
3. Emergency Appropriations for Florida
4. Network Coverage of Conventions
5. Energy Policy
6. The Deficit
7. Committee on Present Danger
8. Ravages of Tropical Storm Gaston on Virginia
9. Nomination of Michael H. Watson to Be United States District Judge for the Southern District of Ohio
10. Emergency Supplemental Appropriations for Disaster Relief Act, 2004
11. Unanimous-Consent Agreement, H.R. 4567
12. MADD
13. The Right Course for the Economy
14. Local Law Enforcement Act of 2003

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*. The 2004 federal election occurred on November 2nd. Sixty days prior to the Federal Election Day was September 3rd. The following issues were considered on the floor of the Senate during that time. This list excludes renaming of buildings and recognizing honored individuals and groups, and extensions of remarks.

15. Passage of U.S.-Australia Free Trade Agreement Act
16. Resolve, the National Infertility Association
17. Preliminary Report of the U.S. Commission on Ocean Policy
18. Postal Accountability and Enhancement Act
19. North American Exploration
20. Notification of the President's Intention to Designate Iraq as a Beneficiary Developing Country for Purposes of the Generalized System of Preferences, Pm 92
21. Foreign Travel Financial Reports
22. Authorization to Sign Bills and Resolutions
23. Measure Read the First Time, S. 2774
24. Appointment
25. Nominations
26. Confirmations

Issues Discussed September 8, 2004, 150 Cong. Rec. S8925-8975 (Daily Ed. Sept. 8, 2004).

1. Sacrifices of Our Military Men and Women
2. Assault Weapons Ban to Expire
3. Iraq
4. Congressional Budget Office September Update
5. Reimportation of Drugs
6. Department of Homeland Security Appropriations Act, 2005
7. Local Law Enforcement Act of 2003
8. 2004 Olympic Games
9. Supplemental Appropriations Bill
10. The Benigno Family and Brain Injury Research
11. American Legion of Osage, Ia
12. Measure Placed on Calendar, S. 2774
13. Nominations

Issues Discussed September 9, 2004, 150 Cong. Rec. S8977-9045 (Daily Ed. Sept. 9, 2004).

1. Reform of the Intelligence Community

2. Homeland Security Appropriations
3. Concerns in South Dakota
4. Highway Legislation
5. Flip-flopping
6. Sales Tax
7. FSC/ETI Jobs Conference
8. Sales Tax Deductibility
9. Conclusion of Morning Business
10. Department of Homeland Security Appropriations Act, 2005
11. Garrett Lee Smith Memorial Act
12. Local Law Enforcement Act of 2003
13. War on Proliferation
14. Back to School and the No Child Left Behind Act
15. Global Health and Protection Against Bioterror Attacks
16. Green Mountain Audubon Nature Center
17. Expressing Outrage at the Terrorist Atrocities in Beslan, Russia
18. Authorizing President to Award Gold Medal to Martin Luther King and Widow Coretta Scott King
19. Sports Agent Responsibility and Trust Act Issues Discussed September 10, 2004, 150 Cong. Rec. S9047-9097 (Daily Ed. Sept. 10, 2004).
1. Reflecting on September 11, 2001
2. Department of Homeland Security Appropriations Act, 2005
3. The Administration's Incompetence on Iraq
4. Health Care
5. Taxation of High-Speed Internet Access
6. Time Is Running Short
7. Pharmaceutical Market Access and Drug Safety Act of 2004
8. Garrett Lee Smith Memorial Act
9. Report Relative to the Continuation of the National Emergency with Respect to Certain Terrorist Attacks, Pm 93

10. Garrett Lee Smith Memorial Act
11. Designating September 11 as a National Day of Voluntary Service, Charity, and Compassion
12. Conveyance of the Real Property Located at 1081 West Main Street in Ravenna, Ohio
13. Nominations

Issues Discussed September 13, 2004. 150 Cong. Rec. S9099-9154 (Daily Ed. Sept. 13, 2004).

1. Medical Liability Reform
2. Intelligence Reform
3. Emergency Assistance for FEMA
4. Assault Weapons Ban
5. Intelligence Reform, Iii
6. Failed Policy in Iraq
7. Department of Homeland Security Appropriations Act, 2005
8. John Kerry's Health Care Plan
9. Local Law Enforcement Act of 2003
10. Budget Scorekeeping Report
11. Nurse-managed Clinics Vital to Va
12. Soldiers and NASCAR
13. Appointment
14. Nominations

Issues Discussed September 14, 2004, 150 Cong. Rec. S9155-9240 (Daily Ed. Sept. 14, 2004).

1. Rosh Hashanah and Anti-Semitism
2. Reimportation of Prescription Drugs
3. Escalating Costs of Medicare
4. The Federal Government must Keep its Education Promises
5. Health Care in America
6. Anti-Jewish Sentiment in Europe
7. Department of Homeland Security Appropriations Act, 2005
8. Recess
9. Local Law Enforcement Act of 2003

10. Hungarian Gold Train
11. Unanimous Consent Agreement, S. 2674
12. Order to Request Return of Papers, S. 2261

Issues Discussed September 15, 2004, 150 Cong. Rec. S9241-9361 (Daily Ed. Sept. 15, 2004).

1. Appropriations and Intelligence Reform
2. Military Construction Appropriations Act, 2005
3. Morning Business
4. Continuing the Fight Against Anti-Semitism
5. Violence Against Women Act
6. Rosh Hashanah and Hope
7. Lack of Direction
8. Legitimacy of News Stories
9. Land and Water Conservation Fund
10. Energy
11. Conservation Royalties
12. Squeeze on Middle-income Families
13. The Economy
14. Need for Energy Legislation
15. Homeland Security Appropriations
16. Local Law Enforcement Act of 2003
17. American Youth Philharmonic Orchestra
18. Federal Trade Commission Reauthorization Act
19. Republican High Tech Task Force
20. Employment Opportunities for Native People
21. Funding for Hurricane Damage
22. Department of Homeland Security Appropriations Act, 2005
23. Calling for the Suspension of Sudan's Membership on the U.N. Commission on Human Rights
24. Unanimous Consent Agreement, S. 2666
25. Federal Trade Commission Reauthorization Act of 2003

26. Implementation of Fish Passage and Screening Facilities at Non-federal Water Projects
27. Wallowa Lake Dam Rehabilitation and Water Management Act of 2004
28. Alaska Native Allotment Subdivision Act
29. Southwest Forest Health and Wildfire Prevention Act of 2004
30. Arch Hurley Conservancy District Water Conservation Project Feasibility Study
31. Valles Caldera Preservation Act of 2004
32. Manhattan Project National Historical Park Study Act
33. Craig Recreation Land Purchase Act
34. Lease Lot Conveyance Act of 2002 Amendments
35. Johnstown Flood National Memorial Boundary Adjustment Act of 2003
36. Extension of the Term of Forest Counties Payments Committees
37. Arapaho and Roosevelt National Forests Land Exchange Act of 2004
38. Extension of the Deadline for Construction to Commence on a Hydroelectric Project in Alaska
39. Carpinteria and Montecito Water Distribution Systems Conveyance of 2003
40. Williamson County Water Recycling Act of 2003
41. Amendment to the Reclamation Project Authorization Act of 1972
42. National Aviation Heritage Area Act
43. Northern Rio Grande National Heritage Area Act
44. Atchafalaya National Heritage Area Act
45. Kate Mullany National Historic Site Act
46. Additional Appropriations for the Reclamation Safety of Dams Act of 1978

47. United States-Mexico Trans-boundary Aquifer Assessment Act
48. Land Exchange in Everglades National Park
49. Tapoco Project Licensing Act of 2004
50. Frannie, Wyoming Land Conveyance
51. Rio Grande Natural Area Act
52. Edward H. Mcdaniel American Legion Post No. 22 Land Conveyance Act
53. Railroad Right-of-way Conveyance Validation Act of 2003
54. Big Horn Bentonite Act
55. Federal Land Recreational Visitor Protection Act of 2004
56. El Camino Real De Los Tejas National Historic Trail Act
57. Lewis and Clark National Historical Park Act of 2004
58. Sand Creek Massacre National Historic Site Trust Act of 2004
59. Conveyance to Beaver County, Utah
60. Jean Lafitte National Historical Park and Preserve Boundary Adjustment Act of 2004
61. New Mexico Water Planning Assistance Act
62. Lake Nighthorse
63. Chimayo Water Supply System and Espanola Filtration Facility Act of 2004
64. National Heritage Partnership Act
65. Mount Rainier National Park Boundary Adjustment Act of 2004
66. Amendments to the Reclamation Projects Authorization and Adjustment Act of 1992
67. Martin Luther King, Jr., National Historic Site Land Exchange Act
68. Timucuan Ecological and Historic Preserve Boundary Revision Act of 2004

69. California Water Security and Environmental Enhancement Act
70. Nominations

Issues Discussed September 20, 2004, 150 Cong. Rec. S9365-9394 (Daily Ed. Sept. 20, 2004).

1. The Federal Judiciary
2. Hurricane Ivan
3. One Shot Antelope Hunt
4. Celebrating the Constitution
5. Military Construction Appropriations Act, 2005
6. Implementation of Accountability Provisions for Students with Special Needs
7. Local Law Enforcement Act of 2003
8. Opening of the National Museum of the American Indian
9. Submitting Changes to 302(a) Allocations
10. Apology to the Boston Globe
11. Alzheimer's Disease
12. Marine Corps Air Station Miramar: Top Marine Corps Installation
13. Executive Order That Terminates the Emergency Declared in Executive Order 12543 with Respect to the Policies and Actions of the Government of Libya and Revokes Related Executive Orders, Pm 94
14. Edward H. Mcdaniel American Legion Post No. 22 Land Conveyance Act
15. Lewis and Clark National Park Act of 2004
16. Jean Lafitte National Historical Park and Preserve Boundary Adjustment Act of 2004
17. Order to Request for Return of Papers, H.R. 4567
18. Appointments
19. Nomination Placed on Calendar, PN-1267
20. Nominations
21. Confirmations

Issues Discussed September 21, 2004, 150 Cong. Rec. S9395-9469 (Daily Ed. Sept. 21, 2004).

1. Intelligence Reform
2. Asbestos Exposure
3. Native American Museum
4. Senator Kerry's Iraq Plan
5. Widening of the Income Gap
6. Instability in Iraq
7. President Bush's Accomplishments
8. The Economy
9. Medicare Premium Increase
10. Iraq
11. Charitable Giving Act
12. Unanimous Consent Request, H.R. 1261
13. Ugliness of American Politics
14. Voting in America
15. Apology to the People of South Dakota
16. Three Major Hurricanes in Florida
17. The Situation in Russia: Back in the USSR
18. No Plan for Iraq
19. Legislative Branch Appropriations Act, 2005
20. Election Contest
21. Guiding Principles for Intelligence Reform
22. Caution in Post-9/11 Commission Era
23. Intelligence System
24. Roadblock to Progress
25. Peace in Sudan
26. Remarks to the Council on Foreign Relations
27. Local Law Enforcement Act of 2003
28. West Virginia's 2004 Angels in Adoption
29. Supporting Children in Crisis
30. Endorsement of the Public Safety Officers' Defense Act
31. The Air Force Academy Drum and Bugle Corps

32. Beale Air Force Base: Air Force Excellence
33. Report Declaring the Continuation of the National Emergency with Respect to Persons to Commit, Threaten to Commit, or Support Terrorism, Pm 95
34. Maritime Transportation Security Act of 2004
35. Unanimous Consent Agreement, H.R. 1350
36. Nominations

Issues Discussed September 22, 2004, 150 Cong. Rec. S9471-9538 (Daily Ed. Sept. 22, 2004).

1. Nomination of Porter Goss to Be CIA Director
2. Intelligence Deliberations
3. The Skyrocketing Cost of Health Care
4. The United Nations
5. Iraq
6. Hurricane Devastation
7. Intelligence Reform and the War on Terrorism
8. Education Funding
9. Student Loan Scandal
10. The Economy
11. The Tax Bill
12. Lobbying about Medicare
13. Local Law Enforcement Act of 2003
14. Security for Supreme Court Justices
15. Rotterdam Convention on Prior Informed Consent
16. Lanham Act Clarification
17. Missouri River Drought Conservation Plan
18. Jumpstart Our Business Strength Act
19. Unanimous-consent Request, S. 2273
20. District of Columbia Appropriations Act, 2005
21. Measure Read the First Time, S. 2830
22. Responding to Conditions in Burma under the Illegitimate Rule of the State Peace and Development Council
23. Measure Placed on the Calendar, S. 2823

24. Orders for Thursday, September 23, 2004
25. Confirmation

Issues Discussed September 23, 2004, 150 Cong. Rec. S9599-9656, S9539-9597 (Daily Ed. Sept. 23, 2004).

1. Need to Vote on Reimportation
2. Health Care
3. ``Illegal" War and the Rule of Law
4. America Has a Strong Ally in Iraq
5. Health Care in America
6. Staying the Course in Iraq
7. Hurricane Damage in Florida
8. Miguel Angel Rodriguez, New OAS Secretary General
9. News Conference with President Bush and Prime Minister Allawi
10. Iraq
11. Foreign Operations Amendments
12. Ohio Flooding
13. Intelligence Reform
14. Alternative Energy Tax Credits
15. High Energy Prices and the Strategic Petroleum Reserve
16. Unanimous-consent Agreement, H.R. 4818
17. Working Families Tax Relief Act of 2004, Conference Report
18. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2005
19. Nominations
20. Prime Minister Ayad Allawi's Speech
21. National Museum of the American Indian
22. Stennis Fellows Program
23. Nomination of the Honorable Porter Goss to Be Director of Central Intelligence
24. District of Columbia Appropriations
25. Stem Cell Research

26. Local Law Enforcement Act of 2003
27. Disaster Assistance
28. Greater Civic Awareness
29. John Heinz Senate Fellowship Program
30. Expressing the Sense of Congress in Support of the Ongoing Work of the Organization for Security and Cooperation in Europe
31. Recognizing That Prevention of Suicide Is a Compelling National Priority
32. Amending the Stevenson-Wydler Technology Innovation Act of 1980
33. Comprehensive Peace in Sudan Act of 2004
34. Measures Read the First Time, S. 2844 and S. 2845
35. Measure Placed on the Calendar, S. 2830
36. Unanimous Consent Agreement, S. 2845

Issues Discussed September 24, 2004, 150 Cong. Rec. S9657-9690 (Daily Ed. Sept. 24, 2004).

1. Trade
2. International Trade
3. Iraq
4. Secret Holds
5. The Administration Policy in Iraq
6. North Korea Human Rights Act
7. Help the Victims of Agricultural Natural Disasters
8. Status of the Transportation Bill
9. Homeland Security Needs a Green Light, Not a Blue Slip
10. Working Families Tax Relief Act
11. Foreign Operations Appropriations
12. Continuing Care for Recovering Families Act
13. Keep Our Promise
14. Release of Yaser Hamdi
15. Legislative Branch Appropriations Act, 2005
16. District of Columbia Appropriations Act, 2005

17. Measures Placed on the Calendar, S. 2844 and S. 2845
Issues Discussed September 27, 2004, 150 Cong. Rec. S9691-9759 (Daily Ed. Sept. 27, 2004).
1. A Time for Accomplishments
2. North Platte Canteen in North Platte, Nebraska
3. Order of Procedure
4. Reservation of Leader Time
5. Morning Business
6. Health Care in America
7. Florida's Hurricanes
8. Health Care
9. Iraq
10. National Intelligence Reform Act of 2004
11. Security for Justices, S. 2742
12. Local Law Enforcement Act of 2003
13. Foreign Operations Export Financing, and Related Programs Appropriations Act, 2005
14. National Intelligence Reform Act of 2004, Continued
Issues Discussed September 28, 2004, 150 Cong. Rec. S9761-9866 (Daily Ed. Sept. 28, 2004).
1. Intelligence Reform and Schedule
2. Ensuring a Strong Farm Credit System
3. Intelligence Reform
4. Welfare Reform
5. Four-part Presidential Plan for Iraq
6. Senator Kerry and America's Challenges
7. Thirteen Reasons Why We Are Not Safer
8. Challenges Facing America
9. National Intelligence Reform Act of 2004
10. North Korean Human Rights Act of 2004
11. Local Law Enforcement Act of 2003
12. Ofheo's Investigation of Fannie Mae
13. Boys & Girls Club of America Reauthorization

14. Agriculture Disaster Funding
15. Walter S. Smith, Jr., Chief United States District Judge
16. Coastal Barrier Resources
17. Reauthorization of the Tropical Forest Conservation Act of 1998
18. Measures Read the First Time, S. 2852,-H.R. 1084, and H.R. 1787
19. Supreme Court Authorization
20. Measure Referred, H.R. 3428
21. Confirmations

Issues Discussed September 29, 2004, 150 Cong. Rec. S9867-9994 (Daily Ed. Sept. 29, 2004).

1. Intelligence Reform
2. Our Responsibility to America's Heroes
3. Policy in Iraq
4. National Intelligence Reform Act of 2004
5. Special Olympics Sport and Empowerment Act of 2004
6. In Recognition of His Excellency H.E. Bader Omar Al-Dafa, Ambassador of Qatar to the United States
7. Measures Placed on the Calendar, S. 2852, H.R. 1084, and H.R. 1787
8. Measure Read the First Time, S. 2866
9. Tax Treatment of Bonds and Other Obligations Issued by the Government of American Samoa
10. Reauthorization of the Congressional Award Act
11. Department of Homeland Security Financial Accountability Act
12. Binding Arbitration for Salt River Pima-Maricopa Indian Reservation Contracts
13. Indian Child Protection and Family Violence Prevention Act of 2003
14. Making Continuing Appropriations for the Fiscal Year 2005

15. Reauthorizing Native American Programs Act of 1974
Issues Discussed September 30, 2004, 150 Cong. Rec. S9995-10194 (Daily Ed. Sept. 30, 2004).
1. Completing the Intelligence Reform Legislation
2. Farm Support Programs
3. National Intelligence Reform Act of 2004
4. Iraq, Shifting Rationale
5. Ohio Flooding
6. Commercial Space Launch Act
7. Local Law Enforcement Act of 2003
8. His Excellency Bader Omar Al-dafa, Ambassador of Qatar to the United States
9. A Real Threat to Satellite Television Service
10. Student Loan Abuse Prevention Act
11. Welfare Reform Extension Act, Part Viii
12. To Provide an Extension of Highway, Highway Safety, Motor Carrier Safety, Transit, and Other Programs Funded out of the Highway Trust Fund Pending Enactment of a Law Reauthorizing the Transportation Equity Act for the 21st Century
13. Transportation Reauthorization Bill
14. Measures Read the First Time, H.R. 4596 and H.R. 4606
15. Measure Placed on the Calendar, S. 2866
16. Amendment to Safe Drinking Water Act
17. Limitations and Extension for Certain Coastal Wetland Conservation Projects
18. Amending Fish and Wildlife Act of 1956
19. Improving Access to Assistive Technology for Individuals with Disabilities Act of 2004
20. State Justice Institute Reauthorization Act of 2004
21. Measure Placed on the Calender, S. Res. 360
22. Confirmations

Issues Discussed October 1, 2004, 150 Cong. Rec. S10195-10287 (Daily Ed. Oct. 1, 2004).

1. Darfur
2. National Intelligence Reform Act of 2004
3. Abuse of Foreign Detainees
4. Children's Health Protection and Improvement Act of 2004
5. National Museum of the American Indian
6. Appointment
7. Missing Child Cold Case Review Act of 2004
8. Permitting Church Pension Plans to Be Invested in Collective Trusts
9. Rail Security Act of 2004
10. Public Transportation Terrorism Prevention Act of 2004
11. Confirmation

Issues Discussed October 4, 2004, 150 Cong. Rec. S10289-10379 (Daily Ed. Oct. 4, 2004).

1. Kyoto Protocol
2. Aftermath of Florida Hurricanes
3. Lance Armstrong, a Positive Role Model
4. The Presidential Debates
5. Senator Kerry's Global Test
6. Fighting the War on Terrorism
7. National Intelligence Reform Act of 2004
8. He Sapa Wacipi
9. Local Law Enforcement Act of 2003
10. Chip Protection and Improvement Act
11. Assistive Technology Act of 2004
12. Appointment
13. Amending the Congressional Accountability Act of 1995
14. Miscellaneous Trade and Technical Corrections Act of 2004

Issues Discussed October 5, 2004, 150 Cong. Rec. S10381-10468 (Daily Ed. Oct. 5, 2004).

1. Congressional Intelligence Reform
2. Iraq
3. Intelligence Reform
4. National Intelligence Reform Act of 2004
5. Improved Nutrition and Physical Activity
6. Presidential Debates
7. National Intelligence Reform Act of 2004
8. Recess
9. National Intelligence Reform Act of 2004
10. Notice of Motion to Suspend
11. Mongolia and Burma
12. NAFTA Injury Panel Decision
13. Statement of Intention on S..2796
14. Local Law Enforcement Act of 2003
15. Grant Dollars at EPA
16. Voting Integrity and Verification Act
17. Progress on TAA
18. Oral Health and Older Americans
19. New Jersey Alliance for Action
20. Veterans' History Project
21. Veterans' Compensation Cost-of-living Adjustment Act of 2004
22. Gateway Arch Illumination in Honor of Breast Cancer Awareness Month
23. Modification and Extension of Certain Privatization Requirements
24. Expenditures for Visitors Center at Little Rock Central High School National Historic Site
25. Protecting Older Americans from Fraud Month
26. Department of Veterans Affairs Health Care Personnel Enhancement Act of 2004
27. Nominations

Issues Discussed October 6, 2004, 150 Cong. Rec. S10469-10555, S10557-10613 (Daily Ed. Oct. 6, 2004).

1. Ongoing Job Crisis
2. Domestic Violence
3. War on Terror and the Economy
4. Good Samaritan Volunteer Firefighter Assistance Act
5. Establishing a National Park
6. National Intelligence Reform Act of 2004
7. Amending the Trademark Act of 1946
8. Copyright Royalty and Distribution Reform Act of 2004
9. Economic Development Administration Reauthorization Act of 2004
10. National Intelligence Reform Act of 2004
11. Intelligence Committee Reorganization
12. Health Care
13. Local Law Enforcement Act of 2003
14. Notice of Change in Senate Public Transportation Subsidy Regulations
15. Nominations
16. Confirmations
17. Endorsing the Minimum Wage
18. Certified Registered Nurse Anesthetists
19. Pardoning ``Jack" Johnson
20. Kinship Caregivers
21. Childcare Means Parents in Schools
22. Satellite Home Viewer Act
23. Omnibus Appropriations
24. Anabolic Steroid Control Act of 2004
25. District of Columbia Appropriations for the Fiscal Year 2005, and for Other Purposes, Conference Report
26. Senate Legal Counsel Authorization
27. Family Farmer Bankruptcy Relief Act of 2004

28. National Earthquake Hazards Reduction Program Reauthorization Act of 2003
29. Belarus Democracy Act of 2003
Issues Discussed October 7, 2004, 150 Cong. Rec. S10631-10762 (Daily Ed. Oct. 7, 2004).
1. Thirteen Reasons Why America Is Not Safer Because of President Bush's Foreign Policy
2. Medicare
3. Intelligence Committee Reorganization
4. Washington, Thursday, October 7, 2004
5. Justice Through DNA Technology
6. National Intelligence Reform Bill
7. Privacy and Civil Liberties
8. No Child Left Behind
9. Speech to the United Nations by Tassos Papadopoulos, President of Cyprus
10. CBO Cost Estimate, S. 2773
11. Losing Ground
12. Anabolic Steroid Control Act
13. Rwanda and Sudan: Simply Recognizing Genocide Is Not Enough
14. Making the Most of Foreign Assistance: Family Planning and Development
15. Nuclear Energy for a Balanced Energy Portfolio
16. Art Therapists Vital to the Care of Veterans
17. Passage of the Belarus Democracy Act, Bda
18. Dispersal Barrier
19. Local Law Enforcement Act of 2003
20. Fighting Terrorism in Latin America
21. Measure Read the First Time, S. 2938
22. Appointments
23. Nominations

Issues Discussed October 8, 2004, 150 Cong. Rec. S10763-10897 (Daily Ed. Oct. 8, 2004).

1. Intelligence Reform
2. American Jobs Creation Act of 2004, Conference Report
3. Intelligence Committee Reorganization
4. The DNA Act
5. Corral Drive Elementary School
6. Japan and Burma
7. Local Law Enforcement Act of 2003
8. Passage of H.R. 5149
9. World Food Day
10. Domestic Violence Awareness Month
11. Notice of Change in Regulations Regarding Senatorial Suite Selection
12. Intellectual Property Protection
13. Nomination of Dr. Francis Joseph Harvey to Be Secretary of the Army
14. Satellite Home Viewer Act
15. Authorization for LIHEAP
16. Support of Energy Savings Performance Contracts
17. Bush Iraq Policy
18. Aerospace Manufacturing
19. Privacy and Civil Liberties Oversight Board
20. Taiwan's National Day
21. Detention and Humane Treatment of Captured Terrorists
22. California Desert Protection Act
23. U.S>-japan Relations
24. American Pharmacists Month
25. National Intelligence Reform Act of 2004
26. Amending the Public Health Service Act
27. Veterans' Benefits Improvements Act of 2004
28. Confirmations

Issues Discussed October 9, 2004, 150 Cong. Rec. S10899-11009 (Daily Ed. Oct. 9, 2004).

1. Intelligence Committee Reorganization
2. Innocence Protection Act of 2004
3. Intelligence Committee Reorganization
4. Taxpayer-teacher Protection Act of 2004
5. Extending the Higher Education Act of 1965
6. Mammography Quality Standards Reauthorization Act of 2004
7. Intelligence Committee Reorganization
8. The Sabbath
9. Providing Agricultural Disaster Assistance
10. American Jobs Creation Act of 2004, Conference Report
11. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Conference Report
12. FSC/ETI
13. Unanimous-consent Agreement, S. 2845
14. Military Construction Appropriations Act, 2005, Conference Report
15. Department of Homeland Security Appropriations Act, 2005, Conference Report
16. Honoring Our Armed Forces
17. Medicare Modernization Act
18. Antisemitism
19. Relations with Kyrgzstan
20. Bulletproof Vest Partnership Grant Program
21. Honoring Favorite Teachers
22. Department of Veterans Affairs Real Property and Facilities Management Improvement Act of 2004
23. Granting a Federal Charter to the National American Indian Veterans, Incorporated

Issues Discussed October 10, 2004, 150 Cong. Rec. S11011-11189 (Daily Ed. Oct. 10, 2004).

1. Supporting Goals of Red Ribbon Week
2. Expressing Sense of Senate with Respect to Prostate Cancer Information
3. Special Olympics Sport and Empowerment Act of 2004
4. Columbia Memorial Space Science Learning Center
5. American Jobs Creation Act of 2004, Conference Report
6. Adjournment of the Senate and House of Representatives
7. Family Smoking Prevention and Tobacco Control Act Amending Fair Labor Standards Act of 1938
8. Justice for All Act
9. Influenza Vaccine
10. Second Protocol Amending the Convention Between the United States of America and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
11. Global Anti-Semitism Review Act of 2004
12. Arizona Water Settlements Act
13. Upper White Salmon Wild and Scenic Rivers Act
14. Uintah Research and Curatorial Center Act
15. Rehabilitation of the Benjamin Franklin Memorial in Philadelphia
16. New Jersey Coastal Heritage Trail Route
17. Rocky Mountain National Park Boundary Adjustment of Act of 2004
18. Caribbean National Forest Act of 2004
19. Montana National Forests Boundary Adjustment Act of 2004
20. Redwood National Park Boundary Adjustment Act of 2004
21. Pecos National Historical Park Land Exchange Act of 2004
22. Land Exchange at Fort Frederica National Monument
23. California Missions Preservation Act

24. Highlands Conservation Act
25. Voting Rights of Members of the Armed Services for the Delegate Representing American Samoa
26. John Muir National Historic Site Boundary Adjustment Act
27. Department of Energy High-end Computing Revitalization Act of 2004
28. Boundary Revision of the Chickasaw National Recreation Area
29. Provo River Project Transfer Act
30. Brown Tree Snake Control and Eradication Act of 2004
31. Lincoln County Conservation, Recreation, and Development Act of 2004
32. Mcinnis Canyons National Conservation Area
33. Petrified Forest National Part Expansion Act of 2003
34. Truman Farm House Expansion Act
35. World Year of Physics
36. Hibben Center Act
37. Noxious Weed Control and Eradication Act of 2004
38. Truth Behind Overtime: it Helps Workers
39. Confirmation

Issues Discussed October 11, 2004, 150 Cong. Rec. S11191-11334 (Daily Ed. Oct. 11, 2004).

1. American Jobs Creation Act of 2004, Conference Report
2. Guardsmen and Reservists Financial Relief Act of 2004
3. Refundable Tax Credits for Municipalities
4. Military Construction Appropriations Act, 2005, Conference Report
5. Instructing Conferees on Agriculture, Rural Development, Food and Drug Administration
6. Department of Homeland Security Appropriations Act, 2005, Conference Report

7. To Reauthorize the Individuals with Disabilities Education Act
8. Appointment of Conferees to S. 2845
9. Disaster Assistance
10. Native Hawaiians
11. FSC/ETI
12. Unemployment Figures
13. The Economy
14. Home Ownership Opportunities for Native Americans Act of 2004
15. Unaccompanied Alien Child Protection Act of 2004
16. Controlled Substance Act Amendment
17. Mentally Ill Offender Treatment and Crime Reduction Act of 2004
18. Federal Workforce Flexibility Act of 2004
19. 2004 District of Columbia Omnibus Authorization Act
20. Intelligence Authorization Act for Fiscal Year 2005
21. Amending Section of Immigration and Nationality Act
22. Amending and Authorizing John F. Kennedy Center Act and John F. Kennedy Center for Performing Arts
23. Improving Access to Physicians in Medically Underserved Areas
24. Stem Cell Research
25. A Military Draft
26. Overtime Pay
27. Further Revised Appropriations Allocations Committee
28. Bush Transportation Policies Are Wrong for Rural America
29. Attempts to Kill the ESLGP
30. Leaving West Virginia Children Behind
31. DoD Authorization Conference Report
32. 20th Anniversary of National Breast Cancer Awareness Month

33. MILC Program
34. Intellectual Property Legislation
35. Hungarian Gold Train Case
36. Intellectual Property Protection Act
37. Congratulations to ASCAP on 90 Years of Success
38. The Science of Climate Change
39. Arizona Water Settlements Act
40. U.S. Policy in Iraq
41. The Immigration Provisions of H.R. 10
42. Additional Statements
43. American Jobs Creation Act of 2004
44. Unanimous Consent Agreement, Executive Calendar No. 915
45. Nominations Placed on the Calendar
46. American Veterans Disabled for Life Commemorative Coin Act
47. Asthmatic Schoolchildren's Treatment and Health Management Act of 2003
48. National Estuary Program
49. Federal Regulatory Improvement Act of 2004
50. National Archives and Records Administration Efficiency Act of 2003
51. Executive Branch Financial Accountability Reporting Act of 2004
52. Long Island Sound Stewardship Act of 2004
53. Water Resources Act of 1984 Reauthorization
54. Clarifying the Boundaries of the John H. Chafee Coast Barrier Resources System
55. For the Relief of Rich James Lesley, H.R. 712
56. The Calendar
57. Recognizing the Importance of Early Diagnosis of Tourette Syndrome

58. Amending United States Code to Authorize Appropriations for Administrative Conference of United States
59. Providing for Conveyance of Parcels of National Forest System Land in Apalachicola National Forest
60. Limiting Transfer of Certain Commodity Credit Corporation Funds
61. Intelligence Authorization Act for Fiscal Year 2005
62. Order That All Nominations to Remain Status Quo
63. Amending the Agricultural Adjustment Act
64. Pending Nominations
65. Spaceship One
66. Confirmations

HOUSE OF REPRESENTATIVES – 2006*

Issues Discussed September 7, 152 Cong. Rec. H6305-6365 (daily ed. Sept. 07, 2006).

1. Amendment Process for Consideration of H.R. 2965, Federal Prison Industries Competition in Contracting Act
2. Five Years Late
3. No Amnesty for Illegal Aliens
4. Struggling Families
5. Truth Squad on Waste, Fraud and Abuse
6. Problems in America
7. Secretary Rumsfeld Serves Nation with Dignity and Honor
8. People Protection
9. Winning the War on Terrorism
10. Border Protection and Security Now

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*. The 2006 federal election occurred on November 7th. Sixty days prior to the Federal Election Day was September 8th. The following issues were discussed on the floor of the House of Representatives during that time. This list excludes renaming of buildings, recognizing honored individuals or groups, and extensions of remarks.

11. "Heigh-ho Silver"--and the Border
12. Student Assistance
13. A Letter from Iraq
14. U.S. Military's Readiness Problems
15. Appointment of Conferees on H.R. 5122, G.V. "Sonny" Montgomery National Defense Authorization Act for Fiscal Year 2007
16. Iraq Policy
17. Restoring Democracy to America
18. Thank God for this Democracy and Those Protecting it
19. Public Bills and Resolutions
20. Status Report on Current Spending Levels of On-budget Spending and Revenues for FY 2007 and the 5-year Period FY 2007 Through FY 2011
21. Big-government Solutions Don't Work
22. Iraq Watch
23. National Security and Electromagnetic Pulse
24. American Horse Slaughter Prevention Act

Issues Discussed September 12, 152 Cong. Rec. H6371-6429 (Daily Ed. Sept. 12, 2006).

1. Report on Resolution Providing for Consideration of H. Res. 994, Expressing Sense of the House of Representatives on Fifth Anniversary of Terrorist Attacks Launched Against the United States on September 11, 2001
2. Report on Resolution Providing for Consideration of H.R. 2965, Federal Prison Industries Competition in Contracting Act of 2006
3. Darfur
4. Remembering September 11
5. Imprisonment of Cong Than Do by Socialist Republic of Vietnam
6. Fighting Terrorism
7. National Security

8. Reports of Committees on Public Bills and Resolutions
9. Pakistan Remains Breeding Ground for Terrorism
10. Introduction of the Health Care Price Transparency Act of 2006
11. War in Iraq and Homeland Security Top Issues Facing Our Country
12. Mistakes Made since 9/11/2001
13. Last Best Hope of Earth
14. Comments on Commemorating the Events of 9/11/2001 and on the War on Terror
15. Bush Has Not Learned Lessons of 9/11
16. Support September 11 Victims
17. Questioning Secretary Rumsfeld's Leadership
18. North American Wetlands Conservation Reauthorization Act of 2006
19. Lake Mattamuskeet Lodge Preservation Act
20. Coastal Barrier Resources System Map Replacement Relating to Grayton Beach, Florida
21. Pascua Yaqui Mineral Rights Act of 2006
22. John H. Chafee Coastal Barrier Resources System Boundary Revision
23. National Fish Hatchery System Volunteer Act of 2006
24. Affordable Rural Housing
25. Pueblo De San Ildefonso Claims Settlement Act of 2005
26. Restoring Accountability and Fiscal Discipline
27. 30-Something Working Group

Issues Discussed September 13, 152 Cong. Rec. H6431-h6536 (Daily Ed. Sept. 13, 2006).

1. Report on Resolution Providing for Consideration of H.R. 6061, Secure Fence Act of 2006
2. Report on Resolution Providing for the Adoption of H. Res. 1000, Providing for Earmarking Reform in the House of Representatives

3. NATO Strategic Airlift Capability
4. Democrats Support Democracy at Home as Well as Abroad
5. A New Direction for America
6. Introduction of H. Con. Res. 453
7. Raising the Minimum Wage
8. How Safe Is America Today from Terrorist Attacks?
9. Global War on Terror
10. President Attempts to Connect Iraq with Overall War on Terror
11. America Cannot Afford to Stay the Course
12. President Has Misled the American People on Iraq
13. Presidential Rhetoric Vs. Economic Reality
14. Republicans Prefer to Play Politics
15. Border Security
16. President Bush Uses Nationally Televised Speech to Spread Disinformation
17. Tax Cuts for Wealthy, Pay Cuts for Middle Class
18. Betrayed in the Line of Duty
19. Iraq Is a Distraction
20. President Bush Continues to Misrepresent the War in Iraq
21. Unity and Resolve Will Win the War on Terror
22. Small Business Needs
23. Reports of Committees on Pubic Bills and Resolutions
24. Correcting Enrollment of S. 2590, Federal Funding Accountability and Transparency Act of 2006
25. Restricting Indian Gaming to Homelands of Tribes Act of 2006
26. Providing for Consideration of H. Res. 994, Expressing Sense of the House of Representatives on Fifth Anniversary of Terrorist Attacks Launched Against the United States on September 11, 2001
27. Appointment of Conferees on H.R. 2864, Water Resources Development Act of 2005

28. Narcotics Problem in Afghanistan
29. Providing for Consideration of H.R. 2965, Federal Prison Industries Competition in Contracting Act of 2006
30. Fourteenth Dalai Lama Congressional Gold Medal Act
31. Federal Funding Accountability and Transparency Act of 2006
32. The Road to Affordable Health Care
33. The 30-Something Working Group
34. Department of Veterans Affairs Medical Facility Authorization Act of 2006
35. Restricting Indian Gaming to Homelands of Tribes Act of 2006

Issues Discussed September 14, 152 Cong. Rec. H6537-h6656 (Daily Ed. Sept. 14, 2006).

1. Amendment Process for Consideration of H.R. 6054, Military Commissions Act of 2006
2. We Need a New Direction on Security in America
3. The Face of the Enemy
4. Fear Is All the Republicans Have to Offer
5. America Is Not Safer According to Bipartisan Panel of Foreign Policy Experts
6. U.S. must Use Influence in a Positive Way in the Middle East
7. Catching Bin Laden Won't Make Us Safer?
8. Secretary of Defense Donald Rumsfeld
9. President's Attempts to Connect Iraq with the Overall War on Terror
10. Unjust Prosecution of Two U.S. Border Patrol Agents
11. Time for a Reality Check
12. The Week That Was
13. The Crisis in Iraq
14. Secure Fence Act of 2006

15. Appointment of Conferees on H.R. 2864, Water Resources Development Act of 2005
16. Iraq Watch
17. 30-Something Working Group
18. The Republican Vision for the next Century
19. National Security
20. Federal Prison Industries Competition in Contracting Act of 2006
21. Providing for Earmarking Reform in the House of Representatives
22. Providing for Consideration of H.R. 6061, Secure Fence Act of 2006

Issues Discussed September 19, 152 Cong. Rec. H6661-h6735 (Daily Ed. Sept. 19, 2006).

1. Pretexting and HP
2. Military Coup in Thailand
3. Secure Borders
4. The Pope and Free Speech and Religious Freedom
5. Rule of Law and Prisoners
6. Golden Drain Awards to Chertoff and Rumsfeld
7. Politicizing the War on Terror
8. A Critical Time for the People of Darfur
9. Iraqis must Assume More Responsibility
10. Support the Federal Election Integrity Act
11. Support of U.S. Border Patrol Agents
12. Budget
13. Iran's Nuclear Ambition
14. Sudan Teetering on the Edge of Disaster
15. Combating Corruption Requires Expanding Freedom
16. More Trouble for America's Working Families
17. Democrats Are Prepared to Lead the Country in a New Direction
18. Supporting a New Direction for America

19. H.R. 5555, Trauma Bill
20. What the Constitution Says
21. Democrats and the Budget Deficit
22. Earline Heath King
23. Iraq War
24. Supporting the Goal of Eliminating Suffering and Death Due to Cancer by the Year 2015
25. Condemning the Repression of the Iranian Baha'i Community and Calling for the Emancipation of Iranian Baha'is
26. Wool Suit Fabric Labeling Fairness and International Standards Conforming Act
27. Expressing Sense of the House of Representatives That the Socialist Republic of Vietnam Needs to Do More to Resolve Claims for Confiscated Real and Personal Property
28. Recognizing and Supporting the Success of the Adoption and Safe Families Act of 1997
29. Condemning Human Rights Abuses by the Government of Iran and Expressing Solidarity with the Iranian People
30. Student and Teacher Safety Act of 2006
31. Real Security Special Order
32. The Official Truth Squad

Issues Discussed September 20, 152 Cong. Rec. H6737-h6847 (Daily Ed. Sept. 20, 2006).

1. Americans Know We Can Do Better
2. Americans Deserve Real Immigration Reform
3. Breast Cancer Patient Protection Act
4. The White Flag
5. Bush Economy Is Not Benefiting America's Great Middle Class
6. Report on Resolution Providing for Consideration of H.R. 4830, Border Tunnel Prevention Act of 2006; for Consideration of H.R. 6094, Community Protection Act of 2006; and for

Consideration of H.R. 6095, Immigration Law Enforcement Act of 2006

7. ``Border Security First'' Does Not Mean ``Border Security Only''

8. The Real Guantanamo Bay

9. The Republican Myth of a Healthy Economy

10. Congress Should Help Seniors out by Filling the Doughnut Hole That Millions of Seniors Face

11. Dancing Around Serious Issues and Avoiding Our Congressional Responsibilities

12. A Plea for the Survival of the People of Darfur

13. Prescription Drug Law Creates a Giant Hole in Drug Coverage

14. Stay the Course in Iraq Is Not a Strategy for Success

15. Restoring Economic Opportunity for the Forgotten Middle Class

16. Federal Election Integrity Act of 2006

17. Where Is Lafayette?

18. America Deserves a New Direction on Energy Policies

19. This Administration must Change Direction on Aviation Security

20. Providing a New Direction on Economic Security Issues

21. Iraq

22. President Bush and GOP out of Touch on the Economic Concerns of Americans

23. Unity Needed on Security

24. Searching for the President's Iraq Plan

25. Iranian President's Speech at U.N.

26. Darfur Peace and Accountability Act

27. Blame America First Crowd; Condemn Our Troops

28. Where Do We Stand?

29. Republicans Fencing out Ordinary Americans

30. America Even Better than Wal-mart

31. Addressing the Medicare Part D Doughnut Hole
32. Benjamin Franklin Tercentenary Commission Act of 2005
33. Repeal of Prohibition on Use of Certain Funds for Tunneling in Certain Areas with Respect to Los Angeles to San Fernando Valley Metro Rail Project
34. Wichita Project Equus Beds Division Authorization Act of 2005
35. City of Oxnard Water Recycling and Desalination Act of 2006
36. Condemning Human Rights Abuses by the Government of Iran and Expressing Solidarity with the Iranian People
37. Partners for Fish and Wildlife Act
38. Pets Evacuation and Transportation Standards Act of 2006
39. Continuing the Battle Against Islamic Extremism
40. Tylersville Fish Hatchery Conveyance Act
41. Appalachian Regional Development Act Amendments of 2006
42. The 30-Something Working Group: Democratic Proposals
43. The Official Truth Squad
44. Military Personnel Financial Services Protection Act
45. National Oceanic and Atmospheric Administration Act

Issues Discussed September 21, 152 Cong. Rec. H6849-h6934 (Daily Ed. Sept. 21, 2006).

1. Appointment of Conferees on H.R. 5631, Department of Defense Appropriations Act, 2007
2. Appointment of Conferees on H.R. 5441, Department of Homeland Security Appropriations Act, 2007
3. Protect Our Borders
4. Hold on FDA Commissioner over RU-486
5. Congress Is Acting on Illegal Immigration
6. Signs of War Preparation
7. Federal Contracts and Sudan
8. Wiretapping Surveillance Program

9. Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism--message from the President of the United States (H. Doc. No. 109-135
10. U.S. Congress must Lead on Peace
11. Genocide in Darfur
12. Skyline Membership Corporation
13. Outlaw of the Underground
14. Military Personnel Financial Services Protection Act
15. Appalachian Regional Development Act Amendments of 2006
16. Bad Faith Actions and Policies of State Farm Insurance in Mississippi
17. Republicans out of Touch
18. The New Direction for America
19. The Issues Affecting America
20. The Distinctions Between the Republicans and the Democrats
21. Community Protection Act of 2006
22. Providing for Consideration of H.R. 4830, Border Tunnel Prevention Act of 2006; for Consideration of H.R. 6094, Community Protection Act of 2006; and for Consideration of H.R. 6095, Immigration Law Enforcement Act of 2006

Issues Discussed September 25, 152 Cong. Rec. H6935-h7349 (Daily Ed. Sept. 25, 2006).

1. Report on Resolution Providing for Consideration of S. 403, Child Custody Protection Act
2. Report on Resolution Providing for Consideration of H.R. 2679, Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006
3. English as the Official Language
4. Situation in Iraq
5. Torture Defined

6. A Blessed Nation
7. Correcting Enrollment of H.R. 3127, Darfur Peace and Accountability Act of 2006
8. ``I Pledge Allegiance to Mexico"?
9. Applauding the Capitol Flag Office Employees
10. Hoops for Hope
11. Drought
12. Undermining Efforts to Fight Terrorism
13. The Iraq War
14. Two Captive Israeli Soldiers and Problems with the U.N.
15. Southern Nevada Readiness Center Act
16. Water Resources Research Act Amendments of 2006
17. Authorizing National Park Service to Pay for Subcontractor Services Completed at Grand Canyon National Park
18. General Services Administration Modernization Act
19. Mississippi River Trail Study Act
20. Authorizing Salary Adjustments for Justices and Judges of the United States
21. Ice Age Floods National Geologic Route Designation Act of 2006
22. Supporting the Goals and Ideals of National Myositis Awareness Day
23. Copyright Royalty Judges Program Technical Corrections Act
24. Authorizing Land Conveyance to the Missouri River Basin Lewis and Clark Interpretive Trail and Visitor Center Foundation
25. New Hampshire Wilderness Act of 2006
26. Jean Lafitte National Historical Park and Preserve Boundary Adjustment Act of 2006
27. Lower Farmington River and Salmon Brook Wild and Scenic River Study Act

28. River Raisin National Battlefield Study Act
29. Proud to Be an American Citizen Act
30. Extending Authorization for Establishing a Memorial in the District of Columbia to Honor Veterans
31. National Historic Preservation Act Amendments of 2006
32. 30-Something Working Group
33. Oregon Water Resources Management Act of 2006
34. Piedras Blancas Historic Light Station Outstanding Natural Area Act of 2005
35. Trademark Dilution Revision Act of 2006
36. Calling on the President to Take Immediate Steps to Help Improve the Security Situation in Darfur, Sudan
37. Republicans Provide Security to America
38. Private Property Rights Implementation Act of 2006
39. Darfur Peace and Accountability Act of 2006
40. 2005 District of Columbia Omnibus Authorization Act
41. Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE)
42. Conference Report on H.R. 5631, Department of Defense Appropriations Act, 2007

Issues Discussed September 26,152 Cong. Rec. H7351-h7498 (Daily Ed. Sept. 26, 2006).

1. It's Time the Do-nothing Congress Actually Do Something for the American People
2. National Security
3. Spy Agencies Say Iraq War Worsens Terrorism Threat
4. Preserving the CIA Program
5. Families Face Rising Costs with Falling Wages
6. America's Economic Situation
7. Iraq
8. ``Press One for English"
9. President Bush Misrepresents Iraq's Impact on the Overall Global War on Terror

10. The Barbaric Practice of Game Bird and Illegal Dog Fighting
11. Health Insurance for Life Act (H.R. 5740)
12. Democrats out of Touch
13. Iraq War Creating More Terrorists, Not less
14. National Defense
15. America Is Not Safer Today
16. No Congressional Accomplishments this Year
17. We Need to Change Course in Iraq
18. Sri Lanka Conflict Surges
19. Turkish Penal Code--Elif Shafak's Trial
20. Reynolds Creek Hydroelectric License Extension Bill
21. Swift Creek Hydroelectric License Extension Bill
22. Tygart Dam Project Hydroelectric License Extension Bill
23. Arrowrock Project Hydroelectric License Extension Bill
24. To Extend Temporarily Certain Authorities of the Small Business Administration
25. Providing for Conveyance of Certain National Forest System Land to Laona and Wabeno, Wisconsin
26. Providing for Conveyance of Former Konnarock Lutheran Girls School in Smyth County, Virginia
27. Extending Deadline for Commencement of Construction of Certain Hydroelectric Projects in Connecticut
28. Open Space and Farmland Preservation Act
29. Private Property Rights Implementation Act of 2006
30. Affirming Support for the Sovereignty and Security of Lebanon and the Lebanese People
31. National Institutes of Health Reform Act of 2006
32. Conference Report on H.R. 5631, Department of Defense Appropriations Act, 2007
33. Calling on the President to Take Immediate Steps to Help Improve the Security Situation in Darfur, Sudan

34. Bureau of Alcohol, Tobacco, Firearms, and Explosives (Batfe
35. Global Terrorism
36. National Integrated Drought Information System Act of 2006
37. Encouraging All Offices of the House of Representatives to Hire Disabled Veterans
38. Restoring Fiscal Discipline to Government
39. Permitting Expenditures from Leaking Underground Storage Tank Trust Fund
40. Promoting Antiterrorism Capabilities Through International Cooperation Act
41. Providing for Consideration of S. 403, Child Custody Protection Act
42. Green Chemistry Research and Development Act of 2005
43. More Border Patrol Agents Now Act of 2006
44. Biodefense and Pandemic Vaccine and Drug Development Act of 2006
45. Veterans Identity and Credit Security Act of 2006
46. Child Interstate Abortion Notification Act
47. Child and Family Services Improvement Act of 2006
48. Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006

Issues Discussed September 27, 152 Cong. Rec. H7499-h7676 (Daily Ed. Sept. 27, 2006).

1. Privileged Report on Resolution of Inquiry to Secretary of State
2. Authorizing the Clerk to Make Corrections in Engrossment of H.R. 6166, Military Commissions Act of 2006
3. Report on Resolution Providing for Consideration of H.R. 4772, Private Property Rights Implementation Act of 2006
4. Â Little Truth Goes a Long Way
5. Increase College Grants So More Teens Can Attend College

6. Reauthorize the Ryan White Act
7. Fighting HIV/aids
8. Perils of Amateur Strategy
9. The 9/11 Commission's Recommendations: Interoperability
10. No Congressional Recess until Action Is Taken on Prescription Drug Prices
11. Time for a New Direction
12. Iran
13. Congress Should Make College More Affordable Today by Passing Labor-hhs Bill
14. Congress Should Show That it Is Committed to Securing the American People Today
15. The Congressional Agenda Reflects its Values
16. Do-less-than-nothing Congress
17. Military Commissions Act of 2006
18. Biofuel Act
19. The HIV/AIDS Crisis
20. Homeland Security
21. America's Stonewall
22. College Loans
23. The President and Gas Prices
24. Aids
25. Republicans Have Good Record in Passing Commonsense Energy Solutions
26. Republican Indifference
27. Bulgarian Miracle Continues
28. Hiv/aids Is Wreaking Havoc on African American Communities Across Our Nation
29. Repeal Tax Breaks to Big Oil
30. Raising the Minimum Wage; We Should Increase the Minimum Wage Today
31. The Democrats May Not like It, but We Are Winning the Global War on Terror

32. National Intelligence Estimate and War on Terror
33. Implement the 9/11 Commission Recommendations
34. No Recess until Action on Energy Prices
35. HIV/AIDS
36. Medicare Prescription Drug Benefit
37. First Tee Benefits Inner City Youth
38. Republican Leadership Ignores Labor-hhs-education Spending Bill
39. Republicans Pad the Profit Margins of Drug Companies in Flawed Prescription Drug Law
40. Rubber-Stamp Congress
41. Change in Leadership
42. Authorizing Secretary of the Interior to Improve California's Sacramento-San Joaquin Delta and Water Supply
43. Allowing for Renegotiation of Payment Schedule of Contracts Between Secretary of Interior and Redwood Valley County Water District
44. To Modify a Land Grant Patent Issued by the Secretary of the Interior
45. Rio Arriba County Land Conveyance Act
46. Ouachita National Forest Boundary Adjustment Act of 2006
47. Douglas County, Washington, Pud Conveyance Act
48. Columbia Space Shuttle Memorial Study Act
49. Arthur V. Watkins Dam Enlargement Act of 2005
50. Las Cienegas Enhancement Act
51. Lower Republican River Basin Study Act
52. Colorado Northern Front Range Mountain Backdrop Protection Study Act
53. Railroad Retirement Disability Earnings Act
54. Supporting the Goals and Ideals of ``Lights on Afterschool!"
55. New Mexico Water Planning Assistance Act

56. Financial Services Regulatory Relief Act of 2006
57. Mark-to-market Extension Act of 2006
58. Nonadmitted and Reinsurance Reform Act of 2006
59. Dam Safety Act of 2006
60. Extending Secretary of Education Waiver Authority
61. Hedge Fund Study Act
62. Ratifying Conveyance of a Portion of the Jicarilla Apache Reservation to Rio Arriba County, State of New Mexico
63. Providing for an Adjournment or Recess of the Two Houses
64. Financial Services Regulatory Relief Amendments Act of 2006
65. Rio Grande Natural Area Act
66. Pueblo of Isleta Settlement and Natural Resources Restoration Act of 2006
67. Mark-to-market Extension Act of 2006
68. FHA Multifamily Loan Limit Adjustment Act of 2006
69. Upper Mississippi River Basin Protection Act
70. Community Development Investment Enhancements Act of 2006
71. Commission to Study the Potential Creation of a National Museum of American Latino Heritage Act of 2006
72. Great Lakes Fish and Wildlife Restoration Act of 2006
73. Hope Vi Reauthorization Act of 2006
74. Marine Debris Research, Prevention, and Reduction Act
75. Utah Recreational Land Exchange Act of 2006
76. Supporting Efforts Promoting Greater Public Awareness of Effective Runaway Youth Prevention Programs
77. Financial Netting Improvements Act of 2006
78. Esther Martinez Native American Languages Preservation Act of 2006
79. Nonadmitted and Reinsurance Reform Act of 2006
80. Long Island Sound Stewardship Act of 2006

81. Third Higher Education Extension Act of 2006
82. Credit Rating Agency Reform Act of 2006
83. Stevens-Inouye International Fisheries Monitoring and Compliance Legacy Act of 2006
84. Financial Services Regulatory Relief Act of 2006

Issues Discussed September 28, 152 Cong. Rec. H7677-h7848 (Daily Ed. Sept. 28, 2006).

1. Permission to Make Corrections in Engrossment of H.R. 5825, Electronic Surveillance Modernization Act
2. Report on Resolution Providing for Consideration of H.R. 5825, Electronic Surveillance Modernization Act
3. Report on Resolution Waiving Requirement of Clause 6
4. Appointment as Member to Advisory Committee on Student Financial Assistance
5. Hugo Chavez and the American Consumer
6. Report on Resolution Waiving Points of Order Against Conference Report on H.R. 5441
7. Failures of the Congress under Republican Leadership
8. Material Support Bill
9. Shocked at How Awful Iraq Is
10. Victim-activated Landmine Abolition Act
11. Recapping Republican Successes
12. Iraq Making Overall Terrorism Problem Worse--time for New Direction
13. NIE
14. Seniors Once Again Victims of GOP's Cozy Relationship with Drug Companies
15. Time for a Change
16. Iran
17. On the Vietnam Democracy Movement
18. The World Is less Safe
19. The Need for Energy Independence
20. Defense Authorization Bill Aims to Ban Internet Gaming

21. On the Conflict Between Israel and Hezbollah
22. Fort Mcdowell Indian Community Water Rights Settlement Revision Act of 2006
23. Reclamation Wastewater and Groundwater Study and Facilities Act Amendment
24. Woodrow Wilson Presidential Library Authorization Act
25. Ryan White HIV/AIDS Treatment Modernization Act of 2006
26. Appointment of Conferees on H.R. 4954, Security and Accountability for Every Port Act
27. Providing for Consideration of H.R. 5825, Electronic Surveillance Modernization Act
28. Establishing a Pilot Program in Certain District Courts
29. Children's Hospital GME Support Reauthorization Act of 2006
30. Waiving Requirement of Clause 6
31. Secure Border Initiative Financial Accountability Act of 2006
32. Providing for Consideration of Motions to Suspend the Rules
33. Appointment of Conferees on H.R. 4954, Security and Accountability for Every Port Act
34. Waiving Requirement of Clause 6(a
35. Providing for Consideration of H.R. 5825, Electronic Surveillance Modernization Act
36. Coast Guard Authorization Act of 2006
37. Iran Freedom Support Act
38. Electronic Surveillance Modernization Act
39. Older Americans Act Amendments of 2006
40. Ryan White HIV/AIDS Treatment Modernization Act of 2006
41. Conference Report on H.R. 5441, Department of Homeland Security Appropriations Act, 2007

Issues Discussed September 29, 152 Cong. Rec. H7905-h8060 (Daily Ed. Sept. 29, 2006).

1. Conference Report on H.R. 4954, Safe Port Act
2. Conference Report on H.R. 5122, John Warner National Defense Authorization Act for Fiscal Year 2007
3. District of Columbia's 2007 Budget Request Act--message from the President of the United States (H. Doc. No. 109-136
4. Footy's Bubbles and Bones Gala
5. Time for a New Direction
6. Health Care
7. GOP Prepares to Leave Without Holding Administration Accountable on Iraq
8. Do-nothing Congress??
9. Tax Relief/small Business
10. Veterans' Compensation Cost-of-living Adjustment Act of 2006
11. Conference Report on H.R. 5441, Department of Homeland Security Appropriations Act, 2007
12. Private Property Rights Implementation Act of 2006
13. Military Commissions Act of 2006
14. Wright Amendment Reform Act of 2006
15. North Korea Nonproliferation Act of 2006
16. Federal and District of Columbia Government Real Property Act of 2005
17. Alternative Energy Research and Development Act
18. Wright Amendment Reform Act of 2006
19. Safetea-lu Amendments Act

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Issues Discussed September 7, 152 Cong. Rec. S9071-S9226 (daily ed. Sept. 7, 2006).

1. AIDS in 2006--moving Toward One World, One Hope?
2. A Vermont Lesson in How to Export to the World
3. Support for a Special Envoy for Sudan
4. Abraham Lincoln Commemorative Coin Act
5. Recognizing Dialogue on Diversity's 2006 Health Care Symposium
6. The Youthbuild Transfer Act
7. Freedom for Félix Gerardo Vega Ruíz
8. Accountable Budgeting Commission
9. National Security
10. Iran
11. Department of Defense Appropriations Act, 2007
12. Security and Accountability for Every Port Act
13. Family Humanitarian Relief
14. Cowboy Artillery
15. Angels of Adoption
16. Senate Resolution 560--Supporting Efforts to Increase Childhood Cancer Awareness, Treatment, and Research
17. General Services Administration Modernization Act
18. Federal Funding Accountability and Transparency Act of 2006
19. Supporting Efforts to Increase Childhood Cancer Awareness, Treatment and Research

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*. The 2006 federal election occurred on November 7th. Sixty days prior to the Federal Election Day was September 8th. The following issues were considered on the floor of the Senate during that time. This list excludes renaming of buildings, recognizing honored individuals or groups and extensions of remarks.

20. United States-Poland Parliamentary Youth Exchange Program Act of 2006
21. United States Ambassador for ASEAN Affairs
22. Naval Vessels Transfer Act of 2006
23. Stolen Valor Act of 2005

Issues Discussed September 8, 152 Cong. Rec. S9227-S9281 (Daily Ed. Sept. 8, 2006).

1. American Horse Slaughter Prevention Act
2. Security and Accountability for Every Port Act
3. American Energy Independence
4. Intelligence Committee Phase Ii Report
5. Senate Intelligence Committee Report
6. Missile Defense
7. Defense Appropriations
8. Combating Gun Trafficking
9. Congress must Strengthen Whistleblower Protections
10. Department of Defense Appropriations Act, 2007
11. Abraham Lincoln Commemorative Coin Act

152 Cong. Rec. S9283-S9320 (Daily Ed. Sept. 11, 2006).

1. Port Security Improvement Act
2. Security and Accountability for Every Port Act
3. Darfur
4. Federal Funding Accountability and Transparency Act
5. Reducing Foreign Energy Reliance
6. Expressing the Sense of the Senate upon the Five-year Anniversary of the Terrorist Attacks Against the United States on September 11, 2001

Issues Discussed September 12, 152 Cong. Rec. S9321-S9447 (Daily Ed. Sept. 12, 2006).

1. The Definition of Tyranny; Look No Further than the Bush Administration and the Republican Enablers in Congress --
2. Boehringer Ingelheim Vetmedica, Inc.
3. Terror Alert: Loss of Credibility

4. Welcome to President Roh Moo-Hyn of the Republic of Korea
5. The U.N. Human Rights Council: Reform or Regression?
6. Introduction of the Health Care Price Transparency Act of 2006
7. Congressional Budget Office Cost Estimate for H.R. 2965
8. The Foreign Intelligence Surveillance Improvement and Enhancement Act of 2006
9. In Support of a Resolution Calling on Iran to Immediately Fulfill its Nuclear Nonproliferation Obligations, and for Other Purposes
10. Guantanamo Bay
11. President's 9/11 Speech
12. The President's Address to the Nation
13. Security and Accountability for Every Port Act
14. Security and Accountability for Every Port Act
15. Defense Appropriations
16. Let Us Look upon the Ocean with Reverence
17. Making Technical Corrections to the United States Code

Issues Discussed September 13, 152 Cong. Rec. S9449-S9575 (Daily Ed. Sept. 13, 2006).

1. American Horse Slaughter Prevention Act
2. Introducing a Concurrent Resolution Recognizing the Independence of the Courts of the United States
3. Introducing the Remote Monitoring Access Act of 2006
4. Welcome to President Roh Moo-Hyun of the Republic of Korea
5. Administration Stem Cell Veto: "Assault on Science"
6. Pension Protection Act
7. North American Wetlands Conservation Reauthorization Act of 2006
8. Health Information Technology Promotion Act (H.R. 4157~
9. Real Security Amendment

10. NSA Warrantless Surveillance Program
11. Unity in the War on Terror
12. Security and Accountability for Every Port Act
13. The Character of the Senate
14. Senate Select Committee on Intelligence Oversight
15. Senate Concurrent Resolution 114–Providing for Corrections to the Enrollment of the Bill S. 2590
16. Corrections to the Enrollment of S. 2590
17. Fort McDowell Indian Community Water Rights Settlement Revision Act of 2006
18. Children and Media Research Advancement Act
19. Death on the High Seas Act
20. Calling on the President to Take Immediate Steps to Help Stop the Violence in Darfur

Issues Discussed September 14, 152 Cong. Rec. S9577-S9647 (Daily Ed. Sept. 14, 2006).

1. Fourteenth Dalai Lama Congressional Gold Medal Act
2. Homeless Veterans
3. Appointment of Conferees on H.R. 2864, Water Resources Development Act of 2005
4. Introduction of the Income-dependent Education Assistance Act of 2006
5. Providing for Consideration of H. Res. 994, Expressing Sense of the House of Representatives on Fifth Aniversary of Terrorist Attacks Launched Against the United States on September 11, 2001
6. Introducing Bill to Establish Mineral Commodity Information Administration
7. Azerbaijan--time to Free the Political Prisoners
8. "Iraq Watch"
9. Safety and Security of the American People
10. Republicans Are Committed to Making America Safer
11. America's Status in Fighting Terrorism

12. Osama Bin Laden Still Loose
13. Security and Accountability for Every Port Act
14. Darfur
15. Boxing
16. Changing the Tide
17. NSA-related Bills and Proposed Changes to War Crimes Act
18. Senate Concurrent Resolution 115--expressing the Sense of Congress with Respect to Raising Awareness and Enhancing the State of Computer Security in the United States, and Supporting the Goals and Ideals of National Cyber Security Awareness Month
19. Unanimous Consent--H.R. 5684

Issues Discussed September 15, 152 Cong. Rec. S9649-S9663 (Daily Ed. Sept. 15, 2006).

1. Providing for Consideration of H. Res. 994, Expressing Sense of the House of Representatives on Fifth Anniversary of Terrorist Attacks Launched Against the United States on September 11, 2001
2. Federal Prison Industries Competition in Contracting Act of 2006
3. Effective Tools to Fight Terrorism
4. Detainees
5. Tax Extenders
6. Indian Health Care
7. United States-Oman Free Trade Agreement Implementation Act
8. Federal Funding Accountability and Transparency Act
9. Protocol Amending 1962 Extradition Convention with Israel

Issues Discussed September 18, 152 Cong. Rec. S9665-S9687 (Daily Ed. Sept. 18, 2006).

1. Unanimous Consent Agreement--H.R. 4954
2. Constitution Day and Democratic Obstruction

3. The Administration's Mistakes in the Iraq War
4. Oman Free Trade Agreement
5. Proud to Fight for Our Freedoms
6. Food Safety
7. Interrogation of Detainees
8. Crisis of Democracy in the Middle East
9. Sri Lanka
10. Rapid City Weed and Seed
11. Secure Fence Act of 2006--motion to Proceed
12. Vitiation of Action--H.R. 503

Issues Discussed September 19, 152 Cong. Rec. S9689-S9735 (Daily Ed. Sept. 19, 2006).

1. Oman Free Trade Agreement
2. Securing Our Borders
3. Humanitarian Catastrophe in Darfur
4. Congressional Oversight
5. United States-Oman Free Trade Agreement Implementation Act
6. Prayer in the Armed Forces
7. Local Law Enforcement Enhancement Act of 2005
8. Disaster Recovery Personal Protection Act
9. Senate Resolution 573--calling on the United States Government and the International Community to Support the Successful Transition from Conflict to Sustainable Peace in Uganda
10. Senate Resolution 574--recognizing the North Carolina Farm Bureau Federation on the Occasion of its 70th Anniversary and Saluting the Outstanding Service of its Members and Staff on Behalf of the Agricultural Community and the People of North Carolina
11. Supporting Transition from Conflict to Sustainable Peace in Uganda
12. New Hampshire Wilderness Act of 2006

13. Appointment of Conferees--H.R. 4954
14. Water Resources Development Act of 2006
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1. Terrorist Surveillance
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3. Coup in Thailand
4. Secure Fence Act of 2006--motion to Proceed
5. Solidarity with Israel
6. Northern Mariana Islands
7. Condemning Drive Hunts
8. Security and Accountability for Every Port Act
9. Child and Family Services Improvement Act of 2006
10. Code Talkers Recognition Act
11. Reauthorizing the Livestock Mandatory Reporting Act of 1999
12. Agricultural Workers
13. Middle-class Squeeze
14. U.S. Economy Continues to Prosper
Issues Discussed September 21, 152 Cong. Rec. S9859-S10009 (Daily Ed. Sept. 21, 2006).
1. Physician Medicare Payments
2. Drilling for America's Oil
3. Secure Fence Act of 2006--motion to Proceed
4. Local Law Enforcement Enhancement Act of 2005
5. Hate Crime
6. A Few Bad Apples
7. Cost Estimates
8. Code Talkers Recognition Act
9. Patten Seed Company
10. Report on the Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or

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11. Senate Resolution 580--recognizing the Importance of Pollinators to Ecosystem Health and Agriculture

12. Senate Resolution 581--condemning the Anti-democratic Actions of President Hugo Chavez and Admonishing the Statements Made by Him to the United Nations General Assembly on September 20, 2006

13. Lights on Afterschool

14. Veterans' Compensation Cost-of-living Adjustment Act of 2006

15. Detainee Interrogation Agreement

16. Darfur Peace and Accountability Act of 2005

Issues Discussed September 22, 152 Cong. Rec. S10011-S10050 (Daily Ed. Sept. 22, 2006).

1. Credit Rating Agency Reform Act of 2006

Issues Discussed September 25, 152 Cong. Rec. S10051-S10107 (Daily Ed. Sept. 25, 2006).

2. Army Recruiting

3. Oversight Hearings on Iraq and the Global War on Terror

4. The Superdome

5. Border Fencing

6. Climate Change

7. Comprehensive Immigration Reform

8. Global Terrorism

9. Terrorist Tribunals

10. Medicare

11. Secure Fence Act of 2006--resumed

12. Senate Legal Counsel Authorization

13. National Transportation Safety Board Reauthorization Act of 2006

14. Railroad Retirement Technical Improvement Act of 2006

Issues Discussed September 26, 152 Cong. Rec. S10109-S10222 (Daily Ed. Sept. 26, 2006).

1. Homeland Security
2. Homeland Security Appropriations
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4. The 109th Congress
5. Homeland Security and Health Care
6. Family Prosperity Act
7. Oil and Gas Drilling in the Gulf of Mexico
8. America's Security
9. National Competitiveness Investment Act
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11. Secure Fence Act of 2006
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14. Agriculture Natural Disaster Assistance
15. War on Terror
16. Senate Resolution 587--expressing Concern Relating to the Threatening Behavior of the Islamic . . . . (Senate - September 26, 2006
17. Amending the John F. Kennedy Center Act
18. Correcting the Enrollment of H.R. 3127

Issues Discussed September 27, 152 Cong. Rec. S10223-S10348 (Daily Ed. Sept. 27, 2006).

1. National Competitiveness Investment Act of 2006
2. National Security
3. National Intelligence Estimate
4. Military Commissions Act of 2006
5. Demanding Accountability
6. Ultrasound Imaging
7. Burma
8. Nomination of Francisco Augusto Besosa
9. Child and Family Services Improvement Act

10. Senate Concurrent Resolution 119--expressing the Sense of Congress That Public Policy Should Continue to Protect and Strengthen the Ability of Farmers and Ranchers to Join Together in Cooperative Self-help Efforts
11. Senate Concurrent Resolution 120--expressing the Support of Congress for the Creation of a National Hurricane Museum and Science Center in Southwest Louisiana
12. Child Interstate Abortion Notification Act
13. Habeas Corpus--amendment No. 5087

Issues Discussed September 28, 152 Cong. Rec. S10349 – S10494 (Daily Ed. Sept. 28, 2006).

1. Homeland Security
2. Habeas Corpus
3. Secure Fence Act of 2006--resumed
4. Pryor Nomination to PBS Board
5. Decency Blocking Educational Campaign
6. Local Law Enforcement Enhancement Act of 2005
7. Global Warming
8. Wastewater Treatment Works
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12. Mutual Legal Assistance Agreement with the European Union (Treaty Doc. No. 109-13)
13. Extradition Agreement with the European Union (Treaty Doc. No. 109-14)

Issues Discussed September 29, 152 Cong. Rec. S10497-S10822 (Daily Ed. Sept. 29, 2006).

1. Department of Defense Appropriations Act, 2007--conference Report
2. Appropriations
3. Immigration

4. Agricultural Workers
5. Protecting the Public Health
6. Offshore Energy
7. Agricultural Emergency
8. Appropriations
9. AGjobs
10. Bioterrorism
11. Secure Fence Act
12. National Intelligence Estimate--Iraq
13. Wright Amendment Reform Act of 2006
14. New England Wilderness Act of 2006
15. Boy Scouts of America Land Transfer Act of 2005
16. Idaho Land Enhancement Act
17. Natural Resource Protection Cooperative Agreement Act
18. Michigan Lighthouse and Maritime Heritage Act
19. National Historic Preservation Act Amendments Act of 2005
20. Repeal of Certain Sections of an Act Pertaining to the Virgin Islands
21. Compact of Free Association Amendments Act of 2005
22. Dorothy Buell Memorial Visitor Center Lease Act
23. National Park System Study--castle Nugent Farms, St. Croix, Virgin Islands
24. Yuma Crossing National Heritage Area Act of 2000 Amendments Act
25. Sierra National Forest Land Exchange Act of 2005
26. Ukrainian Manmade Famine Memorial Establishment Act
27. Pitkin County Land Exchange Act of 2005
28. Ste. Genevieve County National Historic Site Study Act of 2005
29. National Law Enforcement Officers Memorial Maintenance Fund Act of 2005

30. Northern Colorado Water Distribution Facilities Conveyance Act
31. Salt Cedar and Russian Olive Control Demonstration Act
32. Northern California Coastal Wild Heritage Wilderness Act
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39. Effects of Bush Tax Cuts
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61. National Competitiveness Investment Act
62. NATO Freedom Consolidation Act of 2006
63. Darfur Peaee and Accountability Act
64. The State of the Economy
65. Bankruptcy Reform
66. Iraq and U.S. National Security
67. Higher Education Act Extension
68. National Capital Transportation Amendments Act
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70. Improving Election Practices for November 7th
71. The Kyoto Declaration of Religions for Peace
72. Telecom Reform
73. Religious Liberty and Charitable Donation Clarification Act of 2006
74. Telephone Records and Privacy Protection Act of 2006
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76. Nomination of Richard Hoagland
77. Department of Defense Survivor Benefits Plan
78. Global Warming Reduction Act of 2006
79. Extension of the Higher Education Act
80. Disaster Assistance Reforms
81. Indian Gaming Regulatory Act
82. Clarifying Treatment of Certain Charitable Contributions
83. Financial Netting Improvements Act of 2006
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85. Third Higher Education Extension Act of 2006
86. To Extend the Waiver Authority for the Secretary of Education
87. Older Americans Act Amendments of 2006

88. To Extend Temporarily Certain Authorities of the Small Business Administration
89. Financial Services Regulatory Relief Act of 2006
90. Great Lakes Fish and Wildlife Restoration Act of 2006
91. North American Wetlands Conservation Reauthorization Act of 2006
92. Long Island Sound Stewardship Act of 2006
93. Byron Nelson Congressional Gold Medal Act
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97. Safe Drinking Water Act Amendments
98. Export-import Bank Reauthorization Act of 2006
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100. John Warner National Defense Authorization Act for Fiscal Year 2007–Conference Report
101. Security and Accountability for Every Port Act–Conference Report
102. Department of Defense Authorization Bill

Nos. 06-969 and 06-970

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Appellant,

—v.—

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

SENATOR JOHN MCCAIN, *et al.*,

Appellants,

—v.—

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLEE

JOEL M. GORA
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7926

STEVEN R. SHAPIRO
(Counsel of Record)
MARK J. LOPEZ
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

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H.R. 2929, 108th Cong. (2004) 13

H.R. 4200, 108th Cong. (2004) 12

H.R. 5025, 108th Cong. (2004) 12

H.R. 5107, 108th Cong. (2004) 13

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H.R. 5295, 109th Cong. (2006) 11

H.R. 6056, 109th Cong. (2006) 11

H.R. J.Res. 106, 108th Cong. (2004) 13

S. 2845, 108th Cong. (2004) 12

S. 403, 109th Cong. (2006) 12

S. 3955, 109th Cong. (2006) 12

Other Authorities

"A Review of the Federal Bureau of Investigation's Use of National Security Letters," Office of the Inspector General, U.S. Dep't of Justice, available at http://www.usdoj.oig/reports/FBI/index.htm.....10

STATEMENT OF INTEREST[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws.

For the past three decades, the ACLU has been deeply engaged in the effort to reconcile campaign finance legislation and First Amendment principles, from *Buckley v. Valeo*, 424 U.S. 1 (1976), where we represented our affiliate, the New York Civil Liberties Union, to *Randall v. Sorrell*, 126 S.Ct. 2479 (2006), where the Court once again struck down expenditure limits as unconstitutional.

Of particular note, the ACLU appeared as both plaintiff and co-counsel in *McConnell v. FEC*, 540 U.S. 93 (2003), and as *amicus curiae* in *Wisconsin Right to Life, Inc. v. FEC (WRTL I)*, 546 U.S. 410 (2006). This case represents the next chapter in that story.

With increasing frequency in recent years, the ACLU has relied on broadcast ads to promote its position on civil liberties issues. Those issues, and the need to discuss them, arise throughout the year. But those discussions are often most urgent, and the public most engaged, in the period preceding elections when crucial legislative votes are frequently scheduled.

Until passage of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91, the ACLU was free to determine the manner and content of its political

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[1] Counsel for Appellants in 06-970 has filed a general consent to amicus briefs in support of either party or no party. Letters of consent to the filing of this amicus brief from remaining counsel in these consolidated cases have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party has authored this brief in whole or in part, and no one other than *amicus* or its counsel has made a monetary contribution to its preparation or submission.

speech so long as it respected the limits on partisan political activity imposed by its tax-exempt status under the Internal Revenue Code and its own bylaws, and so long as it did not expressly urge a vote for or against a particular candidate. Under the BCRA, however, the ACLU is presumptively violating the law if it broadcasts any ad during a defined pre-election period that mentions the name of a federal candidate.

The question now before the Court is how and when that presumption can be overcome in an as-applied challenge to BCRA's otherwise categorical ban. The Court's answer to that question will have a substantial impact on the free speech rights of the ACLU and its members.

STATEMENT OF THE CASE

In *McConnell v. FEC*, 540 U.S. 93 (2003), this Court addressed a facial challenge to numerous provisions of the BCRA, including § 203, which bars corporations and unions from engaging in "electioneering communications" with general treasury funds. 2 U.S.C. § 441b(b)(2). That prohibition applies to non-profit corporations as well as for-profit corporations.

An "electioneering communication" is defined by § 201 of the BCRA as any "broadcast, cable, or satellite communication" that: (1) refers to "a clearly identified candidate" for federal office; (2) is made during a blackout period that begins 60 days before a general election and 30 days before a primary election or party convention; and (3) is targeted at the candidate's constituency, except in the case of a presidential candidate, where the targeting requirement does not apply. 2 U.S.C. § 434(f)(3)(A).

The definition of an "electioneering communication" set forth in the BCRA was intended to close what Congress perceived as a loophole in prior law. Specifically, the pre-existing bar on corporate or union expenditures "in connection with a federal election," 2 U.S.C. § 441b(a), had

been construed to reach only ads that met the so-called "magic words" test – that is, ads that expressly urged voters to cast their ballot either for or against a specific candidate. Section 203 of the BCRA was designed to reach further and to prohibit what many in Congress perceived to be "sham" issue ads that omitted the "magic words," but were nevertheless intended to deliver a partisan message.

This Court accepted the legitimacy of that concern in *McConnell* when it upheld the facial validity of the BCRA's ban on "electioneering communications." At the same time, the Court recognized that some ads that fit within the literal definition of an "electioneering communication" do not in fact have an "electioneering purpose." *McConnell,* 540 U.S. at 206. The Court described those ads as "genuine" issue ads rather than "sham" issue ads. The Court further acknowledged that both the parties and the three-judge district court in *McConnell* had disagreed on how many ads fit within each category. No one, however, doubted the existence of such ads, including the staunchest proponents of the BCRA. In the end, this Court found it unnecessary to resolve that dispute in the context of the substantial overbreadth challenge that plaintiffs had presented in *McConnell.* Based on its review of the record, the Court was convinced that the "vast majority" of "electioneering communications" had an "electioneering purpose" and that was sufficient to defeat plaintiffs' substantial overbreadth claim. *Id.* at 206.

McConnell was decided in December 2003. Eight months later, Wisconsin Right to Life (WRTL) filed this action seeking a declaratory judgment that BCRA's ban on "electioneering communications" was unconstitutional as applied to three specific ads that it had been running on Wisconsin radio. It also sought a preliminary injunction that would allow it to continue broadcasting the ads specified in its complaint during the BCRA's blackout period, which

extended for 79 days from August 15 to November 2, 2004, because of the state's election calendar.[2]

WRTL's motion for a preliminary injunction was denied by the district court on the ground that this Court's decision in *McConnell* "leaves no room for the kind of 'as applied' challenge that WRTL propounds before us." *Wisconsin Right to Life, Inc. v. FEC*, 2004 WL 3622736 (D.D.C. 2004), at *2. WRTL's complaint was subsequently dismissed by the district court on the same grounds. *Wisconsin Right to Life, Inc. v. FEC*, 2005 WL 3470512 (D.D.C. 2005).

This Court then reversed in a *per curiam* opinion. *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006). Characterizing its prior decision in *McConnell*, the Court explained that "[i]n upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges." *Id.* Accordingly, the Court remanded to the district court for further proceedings but without providing the district court with any further guidance on the standard for evaluating as-applied challenges to § 203 of the BCRA.[3]

On remand, the district court first held that the case was not moot despite the conclusion of the 2004 election cycle because the legal issues it raised were "capable of repetition, yet evading review." *Wisconsin Right to Life, Inc. v. FEC*, 466 F.Supp.2d 195, 202 (D.D.C. 2006). Turning to the merits, the court then ruled that the ads at issue were neither "express advocacy [n]or its functional equivalent," *id.* at 207, and thus could not constitutionally be barred by the BCRA.

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[2] The 2004 Democratic primary in Wisconsin took place on September 14th, so the 30-day blackout period began on August 15th. By the time the primary was held, the 60-day blackout period preceding the general election on November 2nd had already begun.

[3] Many of the arguments made in this brief were also made in the *amicus* brief submitted by the ACLU in *WRTL I*. They are repeated here because the Court's brief opinion in that case left many anticipated questions unanswered.

In reaching this conclusion, the district court limited its consideration to the actual language of the proposed ads, rejecting any effort to discern the speaker's intent by a broader inquiry into context as "both practically and theoretically unacceptable." *Id.* at 205. As the court noted, disputes about political ads will typically arise "during the expedited circumstances of the closing days of a campaign when litigating contextual framework issues and expert testimony analysis is simply not workable." *Id.* The court also expressed grave misgivings about "delving into a speaker's subjective intent . . . when First Amendment freedoms are at stake." *Id.* at 206.

Rather than engage in such a "speculative" inquiry, the court evaluated WRTL's ads based on five objective factors. Specifically, the court considered whether the ads: (1) describe a legislative issue that is either currently pending or likely to be pending in the near future; (2) refer to the position of the named candidate on that issue; (3) ask the listener to do anything other than contact the candidate about the issue: (4) promote, attack, support, or oppose the named candidate; (5) refer to the upcoming election, candidacy, or political party of the named candidate. *Id.* at 207.

Based on its assessment of those factors, the court granted WRTL's motion for summary judgment.

SUMMARY OF ARGUMENT

The ACLU is a nonpartisan membership organization. It does not engage in partisan political speech. It is, however, an active participant in public debate about civil liberties issues. It seeks to educate the public about its views on those issues, and to influence the decisions of lawmakers and policymakers. The ability to broadcast radio and TV ads to targeted audiences is an important part of the ACLU's advocacy strategy. Indeed, the sponsors of the BCRA chose to target those ads – as opposed, for example, to newspaper

ads that were left unregulated – precisely because of their communicative impact. The free speech rights of the ACLU are thus directly and significantly impaired by § 203 of the BCRA.

The First Amendment protects more than the speaker's right to choose what to say. It also protects the speaker's right to choose how to say it. For that reason, this Court has long held that the government must satisfy strict scrutiny whenever it regulates the content of speech. Likewise, the government must satisfy strict scrutiny whenever it deprives a speaker of access to an entire medium of communication. Section 203 of the BCRA undeniably does both.

Applying strict scrutiny, this Court nonetheless held in *McConnell* that § 203 of the BCRA was facially valid because of the government's compelling interest in preventing corporations and unions from using their general treasury funds – amassed for a different purpose and with the benefit of government conferred advantages – to influence the outcome of federal elections. But that fact cannot and does not justify applying § 203 in circumstances where its underlying interests manifestly do not apply. To rule otherwise, would be in effect to hold that First Amendment rights can be abridged even in the absence of any compelling justification.

This Court properly acknowledged as much when it upheld the right to bring as-applied challenges to § 203 of the BCRA at an earlier stage of this litigation. That right will largely disappear, however, if every as-applied challenge is converted into an open-ended inquiry into meaning and context, as appellants now propose, with the burden on the speaker to prove the lawfulness of its speech.

Either speakers will self-censor because they cannot avoid the time and expense of an as-applied challenge based on subjective and hence uncertain determinations, or the one federal court empowered to hear as-applied challenges to the BCRA will be quickly overwhelmed by the need to resolve

difficult constitutional questions requiring complex evidentiary findings in expedited fashion.[4]

Appellants downplay the significance of these concerns because they posit a world in which very few speakers will have credible as-applied challenges. Indeed, appellants' definition of a credible as-applied challenge is so narrow as to be non-existent. The illustration they offer is telling. According to appellants, a congressional candidate who owns a car dealership bearing his name should not prohibited by § 203 of the BCRA from advertising his car dealership while running for Congress. Brief of Appellants John McCain, *et al.*, at 40 n.27.

If that is the only constitutional limit on § 203, however, then the opportunity to bring as-applied challenges is largely a ruse. It would, for example, provide no relief to the ACLU if it wanted to broadcast an ad urging voters to contact their Senators about repeal of the Military Commissions Act during the blackout period, which for presidential candidates will begin in December of this year (30 days before the first presidential primaries) and continue throughout most of 2008.

Appellants argue that the district court has adopted a bright line rule that can be easily evaded and that will therefore undermine what Congress was seeking to achieve by its ban on "electioneering communications." There are several answers to this concern. First, the district court did not adopt a bright line rule; it identified a series of objective factors to be weighed in individual cases. Second, Congress has no constitutionally legitimate interest in banning political

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[4] There were 1,100 ads broadcast during the 2000 election cycle. *McConnell*, 540 U.S. at 128 n.20. It is not clear from the record how many were broadcast during the blackout period established by the BCRA, but it is fair to assume the percentage is reasonably high. By statute, constitutional challenges to the BCRA must be brought in the District of Columbia and heard by a three-judge district court, §403(a)(1), with direct appeal to this Court, § 403(a)(3).

speech that does not present the problems that § 203 was meant to address. Third, this Court has long held that speakers are entitled to know in advance whether their speech is lawful or not. Fourth, the risk of evasion is minimized by the multi-faceted test that the district court applied.

The specific factors identified by the district court need not be treated as the only constitutionally permissible solution to the constitutional conundrum created by § 203. If it chooses, this Court could rule that the interests asserted in § 203 simply do not apply to speech by nonprofit corporations organized under § 501(c)(4) of the Internal Revenue Code that is entirely funded by individual contributions, thus effectively reinstating the Snowe-Jeffords Amendment to the BCRA as a constitutional rule and relying on IRS to police any alleged transgressions of the tax laws.[5]

Given the arguments made by appellants, however, what is most important is for this Court to preserve the right to a meaningful as-applied challenge for constitutionally protected speech. Congress recognized the need for objective rules when it enacted § 203. The same need exists, and for the same reasons, when defining the constitutional limits of §203's reach. It is unrealistic to ask the judiciary to serve as a pre-screening board for thousands of ads. And, it is unfair to ask speakers who believe they are broadcasting "genuine" issue ads to speak at their peril because there is no way to know with assurance whether their ads will later be construed as prohibited "electioneering communications." A clearly defined safe harbor solves both problems. By minimizing the

[5] We recognize that this alternative would require the Court to revisit some of its conclusions in *McConnell*. But, it would also provide the greatest free speech protection while still respecting the underlying values that led Congress to pass the BCRA and this Court to uphold it against a facial challenge.

chilling effect on speakers, it also reduces the need for litigation in the vast majority of cases.[6]

ARGUMENT

ABSENT CLEAR RULES DEFINING THE PROPER SCOPE OF AN AS-APPLIED CHALLENGE, § 203 OF THE BCRA IMPOSES A DIRECT, SUBSTANTIAL, AND UNJUSTIFIABLE BURDEN ON THE ACLU'S CORE POLITICAL SPEECH

The ACLU was founded in 1920. In 87 years, it has never endorsed or opposed a candidate for elective office.[7] Nonetheless, because the ACLU is organized as a nonprofit corporation under § 501(c)(4) of the Internal Revenue Code, it is presumptively barred by the BCRA from broadcasting any ad that mentions the name of a federal candidate in the period preceding a primary or general election. In considering the proper scope of a potential as-applied challenge, it is critical to take into account the substantial burden that this statutory ban, as written, imposes on organizations like the ACLU, its members, and others in the general public who might hear and consider the organization's message.[8]

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[6] The ACLU agrees with appellee and the district court that this case is not moot, but we do not address that issue in this brief.

[7] ACLU Board Policy 519 categorically states: "The ACLU does not endorse or oppose candidates for elective office."

[8] For the ACLU, the burden imposed by § 203 is not ameliorated by the two possible escape routes this Court identified in *McConnell:* creating a Political Action Committee (PAC) or seeking designation as a *"MCFL"* corporation. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). Requiring the ACLU to speak through a PAC is not the equivalent of asking a group of demonstrators to reroute their march down Sixth Avenue rather than Fifth Avenue. PACs are associated in the public mind with partisan political activity. The formation of a PAC would therefore threaten one of the ACLU's most valuable organizational assets – its nonpartisan reputation as an impartial advocate for civil liberties. Furthermore, the detailed rules governing PAC contributions

A. The BCRA Blackout Period Coincides With A Typically Intense Period Of Congressional Activity

The ACLU's sole mission is to preserve and protect civil liberties. In furtherance of that mission, we seek to influence the actions of federal officials on a regular and ongoing basis. Since 9/11, for example, we have frequently criticized the balance that federal officials have struck between liberty and security. We have met with executive branch officials to voice our concerns. And we have attempted to persuade Congress to recalibrate that balance in a variety of ways.

In the past few weeks, bills have been introduced in Congress to restore the right to habeas corpus that was repealed last year by the Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600, passed during the 60 day blackout period preceding the 2006 congressional elections. Congress has also announced its intention to hold hearings on the recent report by the Justice Department's own Inspector General documenting serious abuses by the FBI in the use of National Security Letters authorized by the Patriot Act.[9]

As the ACLU has grown in size and budget, broadcast ads have become an increasingly important part of its advocacy strategy. The goal of such ads is two-fold. The first goal is to alert the public to important civil liberties issues. The second goal is to persuade the public to contact their elected representatives and urge those representatives to

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enhance the risk of diverting funds that would otherwise be available as general support for the ACLU's overall program. These burdens might have to be borne if the ACLU were in fact broadcasting "sham" issues ads designed to influence federal elections. It is not, *see* pp. 14-19, *infra*, and no one in the *McConnell* litigation, where the ACLU was a plaintiff, ever claimed otherwise. Under existing FEC rules, moreover, the ACLU simply not does qualify for "MCFL" designation even though it has never taken more than a *de minimis* amount of corporate contributions.

[9] *See* "A Review of the Federal Bureau of Investigation's Use of National Security Letters," Office of the Inspector General, U.S. Dep't of Justice (available at http://www.usdoj.oig/reports/FBI/index.htm).

take a position that supports civil liberties. The timing of these ads is never determined by the electoral calendar. But the electoral calendar often determines when issues are brought up for a vote on the floor of Congress. That phenomenon is both easy to explain and well understood. For obvious reasons, elected officials like to build a record of accomplishment just prior to elections. In addition, politicians often perceive a political advantage in forcing their opponents to cast a controversial vote just before elections are held.

The 60 days preceding the 2006 election were typical in this regard. Congress considered the following issues of longstanding concern to the ACLU, among many others.[10]

- On October 17th, the Military Commissions Act was signed into law, after votes in the Senate on September 28th and in the House on September 29th.
- On September 12th, a bill was introduced in the House barring domestic electronic surveillance except under FISA and Title III. H.R. 6056, 109th Cong. (2006). Numerous other, related bills were introduced in the House and Senate throughout the month.
- On September 14th, the House voted on a bill to deny attorneys' fees to prevailing plaintiffs in Establishment Clause cases. H.R. 2679, 109th Cong. (2006).
- On September 19th, the House voted on a bill to allow searches of students by schools. H.R. 5295, 109th Cong. (2006).
- On September 20th, the Senate Judiciary Committee held hearings on issues surrounding the creation of a federal reporter's privilege.

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[10] These congressional actions are recorded in weekly editions of the Congressional Quarterly, as well as daily editions of the Congressional Record. They are also available on-line at http://www.cq.com.

- On September 26th, the House International Relations Committee held hearings on ending human trafficking.
- On September 26th, the House voted on a bill to prohibit adults from assisting a minor across state lines to obtain an abortion under certain circumstances. S. 403, 109th Cong. (2006).
- On September 27th, a bill was introduced in the Senate to provide benefits to domestic partners of federal employees. S. 3955, 109th Cong. (2006).
- On September 28th, the House Committee on House Administration held hearings on electronic voting machines.

The congressional calendar was also filled with civil liberties issues in the 60 days preceding the 2004 election.

- On September 21st, the House voted on an amendment to prohibit the use of federal funds to enforce travel restrictions to Cuba. H.R. 5025, 108th Cong. (2004).
- On September 23rd, the House voted on a bill to strip the federal courts, including this Court, of jurisdiction to hear cases challenging the constitutionality of the Pledge of Allegiance. H.R. 2028, 108th Cong. (2004).
- On September 23rd, the Senate voted on an amendment directing the Secretary of Homeland Security to develop a plan to "integrate and consolidate" airline "no fly lists." S. 2845, 108th Cong. (2004).
- On September 28th, the House voted on an amendment to the Defense Authorization bill to expand federal hate crimes legislation. H.R. 4200, 108th Cong. (2004).

- On September 30th, Congress voted on a joint resolution to propose a constitutional amendment banning same sex marriage. H.R. J.Res. 106, 108th Cong. (2004).
- On October 5th, the House voted on a bill to require software companies to obtain permission from computer users before installing spyware programs that collect and distribute personal information. H.R. 2929, 108th Cong. (2004).
- On October 6th, the House voted on an amendment to fund grants to the states for DNA testing, including post-conviction testing for inmates. H.R. 5107, 108th Cong. 2004.
- On October 8th, the House voted on a series of amendments to the Intelligence Overhaul bill that authorized the death penalty for certain terrorist acts, and that altered the rules for the detention and removal of aliens from the country. H.R. 10, 108th Cong. (2004).

Members of Congress are influenced by the views of their constituents when voting on legislation. Mobilizing constituent support is therefore a principal lobbying tactic for advocacy organizations like the ACLU. Broadcast ads are an effective tool for accomplishing that end. To be effective, however, the ads must be targeted to run in the districts of pivotal legislators. Very few advocacy organizations can afford to spend their limited resources running broadcast ads in congressional districts where they will have little impact on the final outcome. The ACLU certainly cannot. In addition, broadcast ads are most effective when they include a call to action: urging constituents to contact their legislative representative. Finally, there is little point in running an ad unless the legislation discussed in the ad is under active consideration by Congress.

Unfortunately, the same characteristics that made a broadcast ad effective – namely, a targeted appeal for constituents to contact a specifically identified legislator prior to a scheduled vote – are precisely the characteristics that render the ad unlawful under the BCRA if the legislator is running for reelection and is mentioned in the ad by name or even just by title (*i.e.*, "call your senator" or "call your representative"). The reach of that ban is magnified, moreover, in a presidential election year because there is no targeting requirement for presidential candidates. Thus, an ad asking the Illinois constituents of Senator Obama, or the New York constituents of Senator Clinton, or the Arizona constituents of Senator McCain to contact their respective senator about an upcoming vote on pending legislation would be barred by the BCRA if it was broadcast 30 days before New Hampshire presidential primary even if the ad was never broadcast in New Hampshire.

B. The ACLU's Use Of Broadcast Ads

Section 7(a) of the Military Commissions Act, adopted by Congress just prior to the 2006 election, amends the general federal habeas corpus statute, 28 U.S.C. § 2241, by providing: "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

The ACLU has made repeal of that provision one of its top legislative priorities. To further that goal, the ACLU is broadcasting the following radio ad in selected states:

> Its been hap[illegible].
>
> Slowly, but surely.
>
> The federal government. Our government. Stripping away our most fundamental Constitutional rights.

> Eavesdropping on Americans, without a warrant. Searching the homes of Americans … who have nothing to do with terrorism.
>
> It's true.
>
> And, last year, Congress even passed legislation eliminating the right of certain people to challenge their unlawful imprisonment. Called habeas corpus.
>
> Undermining the right to due process, and a fair trial.
>
> Now, you can help restore our Constitution …
>
> and reassert the very rights that make us unique as Americans …
>
> by urging Congress to support the "Restoring the Constitution Act."
>
> Call Senator _____ today at _____.
>
> Tell him/her we'll never give up the rights that define us as Americans
>
> Never.
>
> Not on our watch.

An equivalent ad, broadcast last October when Congress was first debating the Military Commissions Act, would have violated the express terms of the BCRA. This precise ad, rebroadcast next year after the presidential campaign primary season has begun, would also very likely violate the express terms of the BCRA (depending on whether any of the named senators were also presidential candidates at the time).

This example is not unique. For instance, in October 2004, right in the middle of the BCRA's blackout period, Congress was considering a bill to implement the recommendations of the 9/11 Commission. The bill included several anti-immigrant provisions that the Commission had

never sought and, indeed, opposed. In seeking to have those amendments dropped from the bill, the ACLU broadcast an ad in Spanish and English in five targeted states with significant immigrant populations. The ad began by stating:

> It doesn't matter if you were the first generation to arrive here.
>
> Or if it was your parents or great-grandparents who came here for a better life.
>
> We all feel a great sense of pride to live in the United States of America.
>
> And, when terrorists attacked us on September 11th, we were one nation.

The ad then ended by urging listeners to call their senator and "[a]sk him to protect our rights by opposing the anti-immigrant amendments in the 9/11 bill."

The language of the ad was identical in all five states except for the senators named in the tag line. Because none of the senators was running for reelection, the ACLU's ad was outside the strictures of the BCRA. Had any of the senators been running for reelection, the ACLU's ad would have been a federal crime. Notably, the list of senators included both Democrats and Republicans.

In both June and August 2005, the ACLU broadcast additional radio ads focused on the Patriot Act. The June 2005 ads ran in a total of twelve states and targeted four senators and eight representatives, each of whom was strategically selected as a potentially critical vote in the Patriot Act reauthorization battle. The August 2005 ads ran in ten states and targeted four senators and nine representatives. One ad, a 60 second spot, was entitled "Concerned Patriots." The test of the ad focused on provisions of the Patriot Act that the ACLU opposed on civil liberties grounds and that public opinion polls had identified as particularly troublesome to the American public.

> How would you like if someone were to sneak into your home and search through your possessions? What if someone secretly helped themselves to your personal medical records or financial statements – without your knowledge or consent? You'd want to call the authorities, right?
>
> Now, what if I told you the people who did this were the authorities? This is one example of what's wrong with the Patriot Act as it currently stands.
>
> Unfortunately, right now the federal government is trying to make the Patriot Act permanent and expand it – even though it contains several provisions that violate our fundamental freedoms.
>
> These provisions give the courts the power to let the federal government secretly search our homes without letting us know for weeks, months, or even longer.
>
> Last time I checked, the Constitution was supposed to stop that kind of thing. Luckily, we still have the First Amendment so we can make our voices heard to correct the Patriot Act before it becomes permanent.

Depending on the venue, listeners were then asked to call either their representative or their named senator and "[l]et him know [Congress] need[s] to make these crucial changes before renewing the Patriot Act." The ad was narrated by Bob Barr, a well-known conservative and former Republican congressman from Georgia. The American Conservative Union and the Americans for Tax Reform joined with the ACLU in paying for the ad, although both organizations disagree with the ACLU on numerous other policy issues. The only thing that saved these ads from being

a crime under the express terms of the BCRA is that they were not broadcast during the BCRA's blackout period.

At the same time that the ACLU was running its broadcast ads, it was also running print ads. For example, in October 2004, the ACLU placed ads in both the Albuquerque Daily Journal Tribune and the Santa Fe New Mexican concerning the proposed anti-immigrant amendments then pending in Congress. The ad asked readers to register their opposition by contacting President Bush and Senator Domenici, whose office phone numbers were listed.

Although the subject matter of the print ads paralleled the subject matter of broadcast ads that were running simultaneously, they were not interchangeable. Broadcast and print ads reach different audiences and have different impact. To the extent that budget permits, the ACLU pursues a comprehensive and integrated communications strategy to promote its civil liberties principles and influence relevant legislative decision-making in Congress. Optimally, that strategy includes both print and broadcast ads. It also includes the Internet, direct mail, press releases, news conferences, public appearances, and publications, among other communications strategies.

For the ACLU, this combination of earned media and paid media has nothing to do with electing or defeating particular candidates. That is not our interest or intent, and the organization has an 87-year history to substantiate that claim. Any commentary on public issues could conceivably affect the electoral choices of some voter. But to treat every comment on public issues as an "electioneering communication" – assuming it meets the definition set out in the BCRA – is to stand the First Amendment on its head.

To be sure, the ACLU could avoid the prohibitions contained in the BCRA by altering its message, its medium, or its messenger. Under the First Amendment, however, those choices should be the ACLU's to make, and not the government's. This Court began recognizing those concerns

in *WRTL I* when it held that §203 of the BCRA could not be treated as a categorical ban insulated from all as-applied challenges. *Accord NAACP v. Button,* 371 U.S. 415, 438 (1963)("Broad prophylactic rules in the area of free expression are suspect."). It is essential now to complete that process by establishing clear as-applied limits on the legitimate scope of § 203.

C. The Need For Clear Lines Distinguishing Between Lawful and Unlawful Broadcast Ads

This case presents the Court with two very different models for adjudicating as-applied challenges to the otherwise absolute ban on "electioneering communications" set forth in § 203 of the BCRA. Appellants insist on the need for a contextual inquiry that goes beyond the "four corners" of the proposed ad to determine the speaker's subjective intent and the likely impact of the ad on potential voters. The district court chose instead to rely on a set of objective criteria for reviewing the text of a proposed ad and determining whether it is intended and likely to influence the outcome of a federal election, and thus within the proper scope of § 203.

Appellants do not quibble with the district court's specific criteria; their objection is that only an inquiry into subjective intent that examines each ad in its broader context can fully close the loophole for "sham" issue ads that § 203 was meant to address. According to appellants, the district court's approach is no more likely to succeed in ending the practice of "sham" issue ads than this Court's earlier effort to define "express advocacy" by reference to a set of so-called "magic words." *Buckley,* 424 U.S. at 44 & n.52. Hence, appellants argue, the district court's approach must be rejected for the same reason that Congress rejected the "magic words" test in § 203, and this Court rejected it in *McConnell.* Appellants are wrong for several reasons, and the cure they propose is worse than the disease.

At the outset, the test developed by the district court for judging as-applied challenges to § 203 does not depend on the presence or absence of specific "magic words." Rather, it examines the text of a proposed ad in its entirety. The question of whether the ad "promotes, attacks, supports or opposes" the named candidate – which most clearly corresponds to the old "magic words" test – is only one factor among several and not dispositive. The principal objection to the "magic words" test was that it could be easily evaded by omitting the words "Vote For" or their equivalent from an ad that seemed clearly intended to influence an election. For better or worse, that would not be enough to mount a successful as-applied challenge under the district court's approach.

The district court's effort to clearly mark the boundary between lawful and unlawful speech, moreover, is entirely consistent with the approach followed by Congress in drafting § 203. Whatever else may be said about the language of § 203, Congress was at least clear in its prohibitions. The district court can hardly be faulted for trying to maintain a similar clarity for speakers seeking to determine whether the strictures of § 203 can constitutionally be applied to a particular ad.

Likewise, nothing in *McConnell* supports appellants' position here. *McConnell* held that the "magic words" test was a matter of statutory construction and could therefore be overruled by Congress. But the issue in this case is not about preserving the "magic words" test. It is about preserving the more fundamental holding in *Buckley,* left undisturbed by *McConnell,* that vague campaign finance rules threaten free speech, whether that vagueness is embodied in the underlying regulations or the procedures developed for enforcing them. 424 U.S. at 43.[11]

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[11] *Cf. Manual Enterprises v. Day,* 370 U.S. 478, 497 (1962)(Brennan, J., concurring)("We risk erosion of First Amendment liberties unless we

The *Buckley* Court explained that threat by quoting from *Thomas v. Collins*, 323 U.S. 516, 535 (1945), a case having to do with efforts to regulate union solicitation.

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question of both intent and of effect No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of the hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley, 424 U.S. at 43.

As the district court correctly recognized, converting every as-applied challenge to § 203 into an unconstrained inquiry designed to probe the speaker's intent for engaging in core political speech suffers from the same "constitutional deficiencies." *Id.* It can have only one of two consequences. Either it will cause speakers to self-censor by steering "far wider of the unlawful zone" than might actually be required because they cannot be certain in advance of what is permitted. *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Or, it will encourage speakers to litigate every potential claim, placing an impossible burden on the one district court that

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train our vigilance upon the methods whereby [speech] is condemned no less than upon the standards whereby it is judged.").

Congress has authorized to hear these claims, *see* n. 4, *supra*, especially under the tight time constraints imposed by BCRA's blackout period. Having to litigate under such exigent circumstances also increases "the possibility of mistaken fact-finding inherent in all litigation," *id.*, thus compounding the First Amendment injury.[12]

Those risks are mitigated by clear and objective rules announced in advance that enable speakers to know with assurance what can be said. That is precisely what the district court attempted to do in this case, and what appellants have criticized. They have not, however, offered a constitutionally credible alternative.

Senator McCain takes the most extreme position. In his view, a speaker must demonstrate that his proposed broadcast ad is fundamentally different "in kind" from the so-called "sham" issue ads that prompted Congress to enact § 203. Revealingly, however, Senator McCain is only able to identify two examples of broadcast ads that would qualify for this exception. One is the previously described ad of a political candidate who also runs a car dealership. *See* p.7, *supra*. The other example, which is equally idosyncratic, would permit an ad by a consulting company that wished to promote its expertise in corporate compliance with the Sarbanes-Oxley Act at the same time that Representative

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[12] The potential scope of such as-applied litigation was aptly summarized by the district court:

> Of course, to discern whether the sponsoring organization of these issue ads had the primary, or even ancillary, subjective intention to affect the election of the named candidate, the FEC would, by necessity, have to depose, at a minimum, the "decision maker[s]" of the organization in advance of the advertisement's airing. Moreover, to determine whether a particular ad that was intended to affect the election actually was likely to do so, would additionally require the retention of expert witnesses, on both sides, to speculate as to such.

466 F.Supp.2d at 205.

Oxley was running for reelection. Brief of Appellants John McCain, *et al.*, at 40 n.27.

While Senator McCain talks about the need to review broadcast ads "in context," his approach to as-applied challenges would eliminate them entirely in all but name only. According to Senator McCain, "an as-applied challenge should succeed only if the plaintiff can show that the ad itself and the circumstances of its creation and airing demonstrate that there is *no* reasonable prospect the ad is likely to influence the election." *Id.* at 39 (emphasis added). That is an impossible standard to meet. *Any* discussion about issues could conceivably influence an election, which, after all, is about issues as well as candidates. It is not surprising, therefore, that the two examples of permissible ads that Senator McCain has identified do not address political issues at all. For Senator McCain, the critical dividing line is not between "sham" issue ads and "genuine" issue ads, but between ads that discuss issues and those that do not. Only in the latter circumstance, would he allow a candidate's name to be mentioned during the pre-election blackout period created by the BCRA.

Such a cramped view cannot be reconciled with either *McConnell* or the First Amendment. All parties in *McConnell* agreed, and the evidence indisputably showed, that § 203 barred some ads that were never intended to influence the outcome of federal elections. The dispute among the parties in *McConnell* was over how many ads fit into each category. The lowest estimate came from the Brennan Center, which was a strong proponent of the BCRA. A study it commissioned in anticipation of the litigation concluded that only 7% of corporate and union ads naming a federal candidate and broadcast during the blackout period were "genuine" issue ads. *McConnell v. FEC*, 251 F.Supp.2d 176, 309 (D.D.C. 2003). The methodology supporting this study was sharply contested, and other evidence in the record placed the figure significantly higher. *Id.* at 309-12.

Ultimately, the *McConnell* Court found it unnecessary to resolve the dispute because it concluded that plaintiffs had not satisfied the substantial overbreadth test. 540 U.S. at 206.

It is equally unnecessary to resolve that dispute here, but for the opposite reason. Even accepting the Brennan Center's figure for present purposes, approximately 75 of the 1,100 ads broadcast during the 2000 election cycle, *see* n.4, *supra,* would qualify as "genuine" issue ads. Yet, none of those ads could have prevailed in an as-applied challenge under Senator McCain's theory. The justification accepted in *McConnell* for banning "electioneering communications" was that such ads "are the functional equivalent of express advocacy." *Id.* at 206. That is not true of "genuine" issue ads, by definition, and a standard for as-applied challenges that does not distinguish between the two cannot be deemed constitutionally sufficient.

Unlike Senator McCain, the FEC candidly acknowledges "the infeasibility of determining on an ad hoc, case-by-case basis, whether particular advertisements discussing issues of public concern are actually intended to influence federal elections." Brief of Appellant FEC, at 30. It further recognizes the need "to identify through clear, objective, and easily applied criteria – criteria that do not require courts to make judgment calls based on fine parsing of the nuances of an advertisement's text – a class of communications that are generally intended to influence electoral outcomes and are likely to have that effect." *Id.*

The logic of the FEC's position falls apart, however, when it suggests that the necessary clarity can be found in § 203 of the BCRA. Section 203 clearly defines the term "electioneering communications," but it provides no guidance at all for determining when an as-applied challenge to that definition should be upheld. Nor does the FEC ever explain why the difficulties inherent in determining a speaker's intent based on an advertisement's text are

ameliorated by a contextual search for evidence of intent beyond the "four corners" of the ad.

In the end, appellants would rather over-censor "genuine" issue ads than run the risk that any "sham" issue ads might be aired. That approach, however, turns the First Amendment "upside down." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). Constitutionally protected speech cannot be criminalized merely because it resembles constitutionally unprotected speech. *Id.*.[13] If that is true for the sexually explicit speech at issue in *Free Speech Coalition*, it is certainly true for political speech that lies at the core of the First Amendment, for reasons this Court has frequently explained.

First, "speech concerning public affairs is more than self-expression, it is the essence of self-government." *Connick v. Meyers*, 461 U.S. 138, 145 (1983), *quoting Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Second, speech cannot be curtailed because of its proximity to an election. *Mills v. Alabama*, 384 U.S. 214 (1966). Third, freedom of speech necessarily "embraces . . . the liberty to discuss publicly and truthfully all matters of public concern . . . ." *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940). Fourth, neither the fact that the speech appears in a paid advertisement, *New York Times v. Sullivan*, 376 U.S. 254 (1964), nor the corporate status of the speaker, *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Consolidated Edison Co. of New York v. Public Service Comm'n of New York*, 447 U.S. 530 (1980), provides a justification for suppressing speech on matters of public concern. Fifth, the Constitution protects the right of individuals to amplify their voice

[13] The ban on broadcast ads not only deprives speakers of their First Amendment rights without any constitutionally adequate justification, it deprives the public of information that can be useful in understanding the policy decisions facing government. Without that information, it is plainly more difficult for the public to participate intelligently in the process of democratic decisionmking.

through group association, *DeJonge v. Oregon,* 299 U.S. 353 (1937). Thus, the government must utilize "sensitive tools," *Speiser,* 357 U.S. at 525, when it seeks to limit such associational activity, even if the association chooses to incorporate, like the ACLU, as a nonprofit entity.

The approach followed by the district court below is plainly more "sensitive" to First Amendment concerns than the broad contextual inquiry advocated by appellants because it avoids a subjective and potentially open-ended inquiry into the speaker's intent. But even the approach adopted by the district court risks suppressing more speech than necessary. It is not entirely clear, for example, how the various factors identified by the district court will be weighed against each other if they do not all point in the same direction. It is also not clear why it should be permissible to ask voters to contact their representative about a specified issue but impermissible to ask voters to urge their representative to reverse a previously expressed position on the same issue.

As an alternative, this Court can and should take the opportunity to reconsider its ruling on the Snowe-Jeffords Amendment. The Snowe-Jeffords Amendment was adopted as § 203(b) of the BCRA. Contrary to the seemingly absolute language of § 203(a), it permitted nonprofit corporations organized under § 501(c)(4) of the Internal Revenue Code, like the ACLU, to engage in "electioneering communications" if those communications were funded by individuals and governed by certain disclosure rules. Section 204 of the BCRA, known as the Wellstone Amendment, then negated what the Snowe-Jeffords Amendment had seemingly allowed by reinstating the prohibitions of § 203(a) for § 501(c)(4) corporations.

In *McConnell,* this Court held that the Wellstone Amendment was controlling as a matter of legislative intent, subject to the judicially imposed caveat that it could not apply to *MCFL* corporations. *See* n.8, *supra.* That decision may well have been correct as a matter of legislative

construction. But, as a matter of First Amendment law, the Snowe-Jeffords Amendment provides a more narrowly tailored response to the asserted congressional interests by leaving the IRS in charge, as it has always been, of policing the line between permissible and impermissible partisan activity by nonprofit entities.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

Steven R. Shapiro
(Counsel of Record)
Mark J. Lopez
American Civil Liberties
Union Foundation
New York, N.Y. 10025
(212) 549-2500

Joel M. Gora
250 Joralemon Street
Brooklyn, N.Y. 11201
(718) 780-7925

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Nos. 06-969 & 06-970

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC.,
Appellee.

SENATOR JOHN MCCAIN, *et al.*,
Appellants,

v.

WISCONSIN RIGHT TO LIFE, INC.,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

JONATHAN P. HIATT
LAURENCE E. GOLD *
AFL-CIO
815 16th Street, N.W.
Washington, DC 20006
(202) 637-5130

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 54 national and international labor organizations with a total membership of 10 million working men and women, files this brief *amicus curiae* in support of Appellee with the consent of the parties as provided for in the Rules of this Court.[1]

INTEREST OF AMICUS

As plaintiffs in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) (No. 02-1755), the AFL-CIO and its connected federal political committee, AFL-CIO COPE PCC (together, "the AFL-CIO Plaintiffs"), brought a facial challenge, under the First Amendment to the United States Constitution, to § 203 of the Bipartisan Campaign Reform Act ("BCRA") of 2002, 2 U.S.C. § 441b(b)(2) and (c) (amending the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*), which proscribes union and corporate funding of "electioneering communications."[2] The AFL-CIO

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

[2] 2 U.S.C. § 434(f)(3)(A)(i), contains what is generally termed the "primary definition" of this term, and 2 U.S.C. 434(f)(3)(A)(ii) contains a "backup definition" that would apply instead if the primary definition were held to be unconstitutional. The primary definition includes a transmission element ("any broadcast, cable or satellite communication"); a content element ("refers to a clearly identified candidate for federal office"); a temporal element (within 60 days before "a general, special or runoff election," or within 30 days before "a primary or preference election" or nominating "convention or caucus" "for the office sought by the candidate") and an audience element ("can be received by 50,000 or more persons" in the relevant electoral jurisdiction). *See McConnell*, 540 U.S. at 189-90. The term "clearly identified" means the candidate's "name," "photograph" or "drawing," and where "the identity of the candidate is apparent by unambiguous reference" otherwise. See 2 U.S.C. § 431(18). As elaborated by an FEC regulation, "the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or 'the incumbent'", or through

Plaintiffs did so because this provision threatened to impair the AFL-CIO's use of the broadcast medium as a legislative and policy advocacy tool, marked an unprecedented legislative incursion on labor organizations' ability to speak out on matters of public concern by treating substantial portions of their public advocacy as electoral in nature, and would impose a substantial and unwarranted burden on AFL-CIO COPE PCC.

The AFL-CIO Plaintiffs placed in the record of that case compact discs and videotapes of approximately 85 different television and radio advertisements that the AFL-CIO had sponsored throughout every year from 1995 through 2001; virtually every ad in turn had numerous versions, the difference in almost every case being the name of the incumbent Member of Congress to whom the ad referred. See Joint Appendix ("J.A."), Vol. I, pgs. 440-62 (Declaration of Denise Mitchell); J.A. Vol. II, pgs. 464-587 (Index of AFL-CIO Issue Advertising, 1995-2001); Brief of AFL-CIO Appellants/ Cross-Appellees at 1-7. *McConnell v. FEC*, No. 02-1674, *et al.* Without specifically addressing the AFL-CIO Plaintiffs' evidentiary submission, however, the Court held that the various *McConnell* plaintiffs had not "carried their heavy burden of proving that [§ 203] is overbroad." *See* 540 U.S. at 203-11.

The AFL-CIO subsequently filed a brief *amicus curiae* in support of the appellant in *Wisconsin Right to Life, Inc. v.*

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an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for Senate in the State of Georgia.'" See 11 C.F.R. § 100.29. A person becomes a "candidate" under FECA upon receiving contributions or making expenditures in excess of $5,000, *see* 2 U.S.C. § 431(2)(A), a threshold routinely met by incumbent Members of Congress almost immediately after winning their most recent election. *See also* 11 C.F.R. § 100.3. As a practical matter, only a Member of Congress who has announced retirement or lost a nomination contest is not a "candidate" at all times, including those periods during which § 203 applies.

FEC, 546 U.S. 410 (2006) (*per curiam*) ("*WRTL I*"), arguing both that as-applied challenges to § 203 were justiciable and that the advertisements at issue were entitled to protection under the First Amendment. In January 2006, the Court unanimously held that its decision in *McConnell* "did not purport to resolve future as-applied challenges," 546 U.S. at ____, 126 S. Ct. 1016, 1018, and observed that "[a]lthough the [Federal Election Commission] has statutory authority to exempt by regulation certain communications from BCRA's prohibition on electioneering communications, § 434(f)(3)(B)(iv), at this point, it has not done so for the types of advertisements at issue here." *Id.* at ___, 126 S. Ct. at 1017.

The following month, the AFL-CIO joined with a usual policy adversary, the Chamber of Commerce of the United States, and three other organizations in a petition asking the Federal Election Commission ("FEC") to initiate a rulemaking to exempt "at least some forms of grassroots lobbying" from that prohibition, in effect a safe harbor for messages that bore particular characteristics. See Petition for Rulemaking: Electioneering Communications and Grassroots Lobbying Exemption (Feb. 16, 2006), www.fec.gov/pdf/nprm/lobbying/orig_petition.pdf. However, after considering 192 comments on the petition (all but one of which supported it), the FEC declined to undertake such a rulemaking, pointing to the pendency of both the case at bar and another pending as-applied challenge (No. 06-589, *Christian Civic League of Maine v. FEC*), and expressing concern that any exemption might become the subject of "new litigation." FEC, "Exception for Certain 'Grassroo's Lobbying' Communications from the Definition of 'Electioneering Communication,'" 71 Fed. Reg. 52295, 52296 (Sept. 5, 2006). The AFL-CIO has a considerable stake in judicial recognition of a meaningful standard for as-applied exceptions to § 203's otherwise absolute prohibition.

SUMMARY OF ARGUMENT

1. In *McConnell v. FEC*, 540 U.S. 93, 206 (2003), the Court upheld the BCRA § 203 prohibition of corporate- and union-financed so-called "electioneering communications" "to the extent that the issue ads broadcast during the pre-election periods...are the functional equivalent of express advocacy." In so holding, the Court focused on one advertisement in the record and posited a hypothetical message that satisfied that standard, neither of which included a reference to a candidate acting in the capacity of an incumbent office-holders. The Court acknowledged that the compelling governmental interests underlying § 203 might not apply to "genuine issue ads" pertaining to "political policy or advocacy of the passage or defeat of legislation," whose existence during the § 203 timeframes it acknowledged. *Id.* at 205.

As the Court aptly observed in *Buckley v. Valeo*, 424 U.S. 1, 42 (1976), discussion of issues "naturally and inexorably . . . exert[s] some influence on voters' choices." A meaningful opportunity to make an as-applied challenge to § 203 must include reliance upon the presence or absence of characteristics that preserve § 203 insofar as it is constitutional, that are readily and objectively determinable, and that cabin a class of communications least likely to be electorally focused. The WRTL advertisements reflect six such characteristics and should be protected.

2. In contrast, the Government and the Intervenors treat the innate fluidity of electoral and non-electoral speech as justification to resist any meaningful protection for issue speech. While the Government correctly acknowledges the problems with a wide-ranging inquiry into a particular advertisement, its analysis of the WRTL's ads belies its sensible cautions. The Government's strict adherence to § 203's "bright line" effectively deprives speakers of any meaningful exception. In conferring discretionary exemption authority

on the FEC in § 203, Congress itself did not envision that § 203's bright line would be absolute.

The Intervenors offer a variety of vague and unworkable standards for identifying what speech § 203 may constitutionally capture. They too intrusively parse the language of the WRTL ads and reach speculative and unjustifiable conclusions from contextual factors whose consideration they erroneously contend should be unlimited, and their comparative examples of speech that merit protection cannot be coherently distinguished from the WRTL advertisements. Their argument also marks an unexplained reversal of the position they urged upon the FEC in its 2002 BCRA rulemaking, when they advocated a virtually entirely content-based exemption to § 203 because it would "assure that the communication plainly and unquestionably is 'wholly unrelated to any election,'" a standard that appears even more exacting than those they urge the Court to apply to the WRTL ads that in all relevant respects fully satisfy their 2002 formulation.

3. In contrast to express advocacy and its "functional equivalent," the Court has never recognized a governmental interest in suppressing the issue speech that merits an as-applied exemption to § 203. That speech serves the First Amendment right to petition the Government, and it is core protected speech regardless of the identity of the speaker. And, the § 203 prohibition is particularly inappropriately applied where, as here, the referenced candidate was running unopposed in a political party primary.

4. The Court should reject the appellants' argument that WRTL's ads should be construed as electoral due to the distinct activities of WRTL's federal PAC. The PAC is a distinct legal entity, and it would effectively impose an unconstitutional forced choice, akin to one the Court rejected in *McConnell*, if the PAC's speech were treated as tainting that of WRTL. Concluding otherwise would disrupt dual organizational structures that both the Federal Election Campaign

Act and the Internal Revenue Code have long protected and encouraged.

Requiring a corporation's separate segregated fund to finance issue speech also unconstitutionally compels the speaker to assert an electoral character to speech against its wishes. And, due to a longstanding Internal Revenue Service rule, the PAC could lose its tax exemption as a result. Requiring groups, particularly in hierarchical structures, to rely upon a PAC for issue speech is also unduly burdensome.

5. Finally, in deciding this case the Court should not foreclose the opportunity for a union or other speaker that is not now before it to make out a class-based exception from § 230. *McConnell* predicated its holding on cases involving corporations and did not specify why § 203 is constitutional as to unions, which have "crucial differences" from corporations that are directly relevant to the justifications underlying laws restricting corporate electoral speech. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655-56 (1990).

ARGUMENT

I. A Meaningful As-Applied Exception to Section 203 Must Be Defined By Bright-Line and Readily Determinable Characteristics

BCRA's "electioneering communications" provision imposes "stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey messages of support or opposition." *McConnell v. FEC*, 540 U.S. at 239 (emphasis in original). In upholding § 203 against plaintiffs' overbreadth challenges, the Court stated that the constitutionally sufficient justifications for § 203 applied only "*to the extent that* the issue ads broadcast during the [pre-election] periods . . . are the functional equivalent of express advocacy," that is, "*if* the ads are intended to influence the voters' decisions and have that effect." *Id.* at 206; *see also id.* at 126-27. The Court deter-

mined that "the vast majority of ads" reflected in the record before it "clearly had such a purpose"; and, in contrast, § 203's application to "pure issue ads" was not "substantial." *Id.* at 206, 207 (emphasis added). While the Court noted the "dispute" among the parties and within the three-judge court in that case as to "the precise percentage" of election-proximate ads in the record that were "genuine issue ads," *id.* at 206, every party and district judge in *McConnell* acknowledged that *some* ads run during the § 203 blackout periods *were* "genuine issue ads."

However, the Court eschewed a detailed treatment of the substantial record of broadcast advertising that was before it. Instead, the Court generally referred to ads that "although . . . not urg[ing] the viewer to vote for or against a candidate in so many words, . . . are no less clearly intended to influence the election." *Id.* at 193 (footnote omitted). The Court illustrated this concept with a single "striking example": a 1996 Montana ad consisting of an *ad hominem* statement that compared a non-incumbent congressional candidate's alleged assault of his wife and failure to pay child support with the candidate's state legislative voting record, and asked listeners to "[c]all Bill Yellowtail. Tell him to support family values." *Id.* at 193 n. 78. The Court otherwise attributed a "vote-for" message only to ads that it hypothetically described as solely "condemn[ing] Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.* at 127 (footnote omitted). Like the Montana ad, this generic ad did not include a plea that listeners call upon the candidate *as an officeholder* either to cast a legislative vote or take any other official action, and it could have been directed at a candidate who was a non-incumbent. The Court discussed no other particular advertisement or specific formulation of advertisements.

By the same token, the *McConnell* majority did not elaborate about what makes ads "genuine," other than by describ-

ing in the manner quoted above what does *not*. But the Court plainly had in mind at least "discussion of political policy or advocacy of the passage or defeat of legislation"; for, it quoted its previous comparison—for purposes of entitlement to First Amendment protection—of that speech with "'[a]dvocacy of the election or defeat of candidates for federal office'" in *Buckley v. Valeo*, 424 U.S. 1, 48 (1976), before explaining why the government had a compelling interest in regulating certain sources of the latter. *See McConnell*, 540 U.S. at 205.

Because § 203 may be constitutionally applied only to the "functional equivalent" of express advocacy, at the core of this case is the question of how to identify candidate-referential messages that do not so qualify. The difficulty in distinguishing the broadcast electoral advertising about which Congress was concerned from other messages arises from inevitable circumstances that this Court aptly described in *Buckley*:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[50]
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> [50] ". . . *Discussions of those issues, as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.*"

424 U.S. at 42 and n.50 (emphasis added), quoting *Buckley v. Valeo*, 519 F. 2d 817, 875 (D.C. Cir. 1975).

The district court below undertook a careful and practical review in concluding that the as-applied analysis should proceed almost entirely on the basis of the "four corners of the

. . . ads" themselves, rather than an unbounded consideration of other material and analysis in order to ascertain a speaker's "subjective intent" or a broadcast message's "likely effect"—matters that, it concluded, were "too conjectural and wholly impractical [to determine] if future as-applied challenges are going to be evaluated on an emergency basis by three-judge panels," as BCRA commands. *Wisconsin Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 205 (D.D.C. 2006). In evaluating whether or not the Wisconsin Right to Life, Inc. ("WRTL") ads merit First Amendment protection from the application of § 203, this Court too should consider what characteristics of a constitutionally protected advertisement will preserve the reach of § 203 insofar as *McConnell* upheld it, and enable speakers, often in exigent circumstances, to proceed without having to "'hedge and trim'" their speech. *See Buckley*, 424 U.S. at 43, quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945). These factors should supply as bright a line as possible and cabin a class of communications that are least likely to be electorally focused, and their presence or absence should be readily determinable without entailing the kind of intrusive discovery and litigation donnybrook that ensued when WRTL sought preliminary relief below, and that would risk an irreparable loss of First Amendment rights.[3]

The WRTL ads that are actually before the Court for decision satisfy the six characteristics enumerated below, and because they do the § 203 prohibition must yield.[4] More objective than several of the considerations enumerated by the district court, these characteristics mark communications

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[3] If the Court determines that there is no constitutionally sufficient means to enable meaningful as-applied challenges to § 203, then it should reconsider its decision in *McConnell* that the § 203 prohibition is itself constitutional, either in deciding the case at bar on the current record, or following supplemental briefing on that question.

[4] These characteristics track those that the AFL-CIO and others proposed that the FEC adopt in 2006.

that in substantial measure *belie* electoral advocacy and are very far removed from the Court's two exemplars—the Montana ad and the Jane Doe ad—of communications that *are* electoral in nature:

> 1. The "clearly identified federal candidate" is an incumbent public officeholder;
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> 2. The communication discusses a particular current legislative or executive branch matter;
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> 3. The communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate in that capacity and urge him or her to do so;
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> 4. If the communication discusses the candidate's position or record on the matter, it does so only by quoting the candidate's own public statements or reciting the candidate's official action, such as a vote, on the matter;
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> 5. The communication does not refer to an election, the candidate's candidacy or a political party; and
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> 6. The communication does not refer to the candidate's personal character, or qualifications or fitness for office.[5]

We acknowledge that an ad that reflects all of these elements nonetheless conceivably could exert some impact under some circumstances on an election, as *Buckley*, 424 U.S. at 42, generally observed. While it is possible to define the sort

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[5] The texts and circumstances of six exemplars of broadcast advertisements that also would satisfy this test are detailed in District Judge Leon's opinion in *McConnell v. FEC*, 251 F. Supp. 2d 176, 488-96 (D.D.C. 2003), as "[r]epresentative [e]xamples of [g]enuine [i]ssue [a]dvertisements" that unconstitutionally would have been subject to § 203 had it been in effect; all are AFL-CIO ads from 1998 or 2000. Each ad discussed a current legislative issue and referred to a "candidate" (each an incumbent Member of Congress) only in calling on him or her to take particular action on the issue. *See id.*

of speech that *necessarily will* influence an election—express advocacy, which is "unambiguously related to [a] campaign," *id.* at 80—it is not possible to devise a definition of speech that *necessarily will not*. We believe that the above characteristics, relevant to deciding the case at bar, carefully "identify[] cases far from the troublesome border," *Brown v. Hartlage*, 456 U.S. 45, 56 (1982), and appropriately balance the competing constitutional considerations at hand, while not foreclosing consideration of other factual circumstances, many of which might not now be easily foreseeable.

II. The Appellants' Analyses Effectively Preclude As-Applied Exceptions and Are Incoherent and Self-Contradictary

1. In sharp contrast to the district court and the proposed analysis above, the Government and the Intervenors treat the innate fluidity of electoral and non-electoral speech as justification to subject virtually all of the latter to the prohibition that § 203 was intended to and constitutionally may impose only on the former. While the Government calls upon WRTL to supply "a legal test that avoids the pitfalls of undue complexity *and* susceptibility to evasion," FEC Br. at 27 (emphasis in original), the Government proposes a standard for an as-applied challenge that simply cannot be met, if indeed it can be understood. Surprisingly, the Government rejects "functional equivalence" to express advocacy as a "workable or administrable" standard for as-applied challenges, terming it a "useful concept" only for "upholding the bright-line limitations" of § 203. *Id.* at 29 n.7. Relying upon the Court's exemption of certain ideological corporations from FECA's independent expenditure ban in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) ("*MCFL*"), the Government instead asserts that an ad is protected only if it "do[es] not pose the danger at which § 203 is directed," FEC Br. at 40, "*at all*, rather than [presenting] differences of degree." *Id.* at 27 (emphasis added).

The Government's analysis does not acknowledge that, at some point, the § 203 "danger" is far too attenuated to justify application of the prohibition. Its analogy to *MCFL* fails because the Court there identified a precisely and objectively determinable class of *speaker* that would be exempt from the ordinary strictures against corporate independent expenditures. *See MCFL*, 479 U.S. at 262-65. But in describing what should be exempted from the § 203 bright-line, the Government suggests no similar precision as to what circumstances—either textually or contextually—do not "pose" the § 203 "danger" "at all." This poses the problem that § 203 was supposedly drafted to solve: avoiding "the vagueness concerns that drove [the] analysis in *Buckley*." *McConnell*, 540 U.S. at 194. Instead, the Government's approach "blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Buckley*, 424 U.S. at 43, quoting *Thomas v. Collins*, 323 U.S. at 535.

The Government does claim to agree with the district court that "requir[ing] examination of *all* facts that are potentially relevant to the ascertainment of an advertisement's purpose or effect" is infeasible, FEC Br. at 27 (emphasis in original), as is any "ad hoc, case by case basis" for doing so, *id.* at 30, and it disclaims on First Amendment grounds "close parsing of the nuances of an advertisement's text." *Id.* at 27. The Government also correctly recognizes that "potential speakers may be chilled if the legality of particular communications or financing arrangements turns on an unstructured post hoc inquiry into the speaker's likely intent." *Id.* at 42. But the Government then ignores its own wise counsel.

First, the Government agrees with the dissenting judge below that WRTL's advertisement that, on its face, complained about judicial filibusters would be "logically directed only at the legislators who have already supported or employed the device," so "'even a textual approach could suggest that . . . [the advertisements] might have implicitly

discouraged Sen. Feingold's election.'" FEC Br. at 37, quoting 466 F. Supp. 2d at 216 (Judge Roberts, dissenting). This reading certainly "close[ly] pars[es] the nuances" of the ad, and if a circumlocution that "*might* have *implicitly* discouraged" a candidate's election "pose[s] the danger at which § 203 is directed" then the Government's standard both "disserve[s] First Amendment values," *id.* at 27, and sets the as-applied bar unreachably high for a speaker to surmount.

Second, despite its rhetorical rejection of a wide-ranging contextual inquiry, the Government urges the Court to consider and evaluate the significance of numerous contextual factors, including the timing of the WRTL ads, the content of WRTL's website, WRTL's conduct over the *subsequent year*, and both prior and contemporaneous speech and activities by WRTL and its federal PAC with respect to Sen. Feingold. *Id.* at 40-48.

By effectively depriving corporations and unions of any opportunity to fund "genuine" broadcast issue advertising during the § 203 timeframes, the Government's test does not comport with our constitutional jurisprudence. "[T]he argument . . . that protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2003).[6]

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[6] Similarly, precisely because "speech on matters of public concern needs 'breathing space' . . . in order to survive," *Nike, Inc. v. Kasky*, 539 U.S. 654, 676 (2003) (Breyer J., dissenting), *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964), where a corporation's regulable "purely commercial" speech is "inextricably intertwined" with "non-commercial" (public issue-oriented) speech, it must not be subject to state "false advertising" and related "unfair competition" regulation because that would chill corporations from "issu[ing] significant communications

2. Nonetheless, the Government touts the § 203 "bright line" as justification in itself to resist recognizing WRTL's, and likely any, as-applied challenge. See FEC Br. at 42-43. But in *MCFL* the Court squarely rejected the same argument, holding that where "the rationale for restricting core political speech is simply the desire for a bright-line rule[, t]his hardly constitutes the *compelling* state interest necessary to justify *any* infringement on First Amendment freedom." 479 U.S. at 263 (first emphasis in original; second emphasis added). Bright-line rules are necessary in areas implicating First Amendment freedoms in order to *protect* speech from governmental interference, not to facilitate governmental *restrictions* on speech. Thus, in *Buckley*, the Court fashioned the bright line of express advocacy in order to clarify and narrow a vague and overbroad statute that otherwise would have trammeled upon non-electoral issue speech and unduly inhibited speakers uncertain about how their speech might be perceived. *See* 424 U.S. at 42-44. And, having done so, the Court then invalidated FECA's $1,000 expenditure limit, both because independent express advocacy did not "presently appear to pose dangers of real or apparent corruption," *id.* at 46, and because a great deal of other speech could be devised that "skirted the restriction on express advocacy of election or defeat but nonetheless benefited the candidate's campaign," *id.* at 457—rationales that *McConnell* explicitly reaffirmed. *See* 540 U.S. at 190-92.

Moreover, Congress itself did not seek to maintain a "bright line" where the application of § 203 would have inappropriate consequences. Thus, BCRA authorizes the FEC by regulation to exempt from the definition of "electioneering communications" "any . . . communication . . . to ensure the ap-

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relevant to public debate" and "thereby limit the supply of relevant information available to those, such as journalists, who seek to keep the public informed about important issues." *Id.* at 682-83 (interim quotation marks omitted). *See also id.* at 663-65 (Stevens J., concurring).

propriate implementation" of the law, so long as the communication does not "promote[] or support[]" or "attack[] or oppose[]"[7] a "clearly identified federal candidate." See 2 U.S.C. § 434(f)(3)(B)(iv), incorporating by reference 2 U.S.C. § 431(20)(A)(iii). The need for a "bright line" standard can hardly be regarded as compelling when Congress itself explicitly allowed the FEC to create exceptions that would breach one.

3. The Intervenors, who were the primary congressional sponsors of BCRA, describe numerous formulations of what § 203 constitutionally covers that are even vaguer and less workable than the Government's: "[a]ny ad that is likely to influence voters' decisions, based on an examination of the ad's objective content and context, sufficiently evinces an electioneering purpose and implicates the legitimate goals of BCRA," Int. Br. at 16; "whether Congress may regulate an ad's financing turns not on whether it uses particular words, or whether it makes its election-related nature explicit, but whether it is likely to function as election advocacy by affecting voters' decisions," *id.* at 23; "an as-applied challenge should succeed only if the plaintiff can show that the ad itself and the circumstances of its creation and airing

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[7] The quoted phrases (sometimes abbreviated as "PASO") are undefined in the statute. In *McConnell*, the Court concluded that these terms, as used in § 431(20)(A)(iii) with respect to political parties, were not unconstitutionally vague. *See* 540 U.S. at 170 n.64. But the same conclusion would not be appropriate if these terms are applied to the speech of entities, like corporations and unions, that are neither parties, candidates nor political committees. Accordingly, that phrase should not demarcate a constitutional line for an as-applied challenge. Neither the Government nor the Sponsors suggest otherwise, and various of their *amici* rightly caution against doing so. *See* Brief for *Amicus Curiae* The League of Women Voters of the United States *et al.* ("LWV Br.") at 10-13. *See also McConnell*, 540 U.S. at 337-38 (Kennedy, J., dissenting). The district court thus erred in recognizing PASO as an element in evaluating as a *constitutional* matter the merits of an as-applied challenge to § 203.

demonstrate that there is no reasonable prospect the ad is likely to influence the election," *id.* at 39; "any ad whose objective characteristics and context indicate that it is likely to have a material effect on voters' choices—and thus to function as the equivalent of express advocacy . . ." *Id.* at 41. And, the Intervenors urge, there should be no restriction on contextual considerations. *Id.* at 31-42.

It is the Intervenors, then, who have drawn "a line in the sand . . . on a windy day." *Id.* at 35. And, not surprisingly, under their analysis "electioneering"—and *only* "electioneering"—lurks everywhere in the WRTL ads. First, the Intervenors emphasize regarding the ads' *content*:

1. Because the ads call on listeners to lobby Sen. Feingold to oppose filibusters, he must be one of the "group of Senators" referred to in the ads who supports them; otherwise, the plea would be "gratuitous." *Id.* at 23. (But this interpretation, like the Government's textual approach, excessively "pars[es] . . . nuances" to discern suspect intent.)

2. Asking listeners also to contact non-candidate Sen. Kohl is simply a "tactic . . . [to] shield . . . otherwise obvious electioneering." *Id.* at 23. (But if objectively non-electoral characteristics of issue advocacy are simply tricks, no message could pass muster.)

3. The ads provide "no contact information" for Sens. Feingold or Kohl. *Id.* at 27. (But in the Internet age, such information may be unnecessary.)

Second, they emphasize regarding the ads' *context*:

1. The website to which the ads directed listeners *did* contain contact information for the two Senators but also material "criticizing [Sens.] Feingold and Kohl for their role in the filibusters." *Id.* at 27. (But even if that website excerpt were relevant to the ad itself, a

website is too dynamic and dense with material to attribute everything on it to a message that simply refers to its URL.)

2. Because Sen. Feingold had "publicly defended the filibusters," listeners would associate him with the "group of Senators" mentioned in the ad. *Id.* at 23. (But this opens the door to speculative and unpredictable considerations of context and general listener awareness.)

3. The ads were broadcast immediately after four Senate cloture votes on judicial nominations and then continued for one week during a Senate recess, and they did not resume later, including the next year when "the filibuster controversy peaked." *Id.* at 28. (But a variety of legitimate tactical considerations influence the timing of advertising, and the determination as to whether a particular broadcast message is constitutionally protected must be made immediately, not in light of what transpires in the future.)

4. WRTL and its PAC previously criticized Sen. Feingold on the filibuster issue. *Id.* at 24. (But see pp. 25-27, *infra*.)

5. WRTL and its PAC opposed Sen. Feingold's 2004 reelection. *Id.* at 24. (But see pp. 25-27, *infra*.)

6. WRTL and its PAC had opposed Sen. Feingold's election in 1992 and reelection in 1998. *Id.* at 24 n.8. But see pp. 25-27, *infra*.)

7. *Others*, including the Wisconsin Republican Party and Republican Senate primary candidates, "invoked [Sen.] Feingold's participation in the filibuster as a central reason he should be defeated," as shown in a newspaper article "a year before the election." *Id.* at 26. (But a group's right to speak cannot be condi-

tioned on the distant actions of others over which the group has no control.)

The Intervenors then contrast the WRTL ads with ads that, they say, would be "truly different in kind" and "might well be deemed to have no realistic connection with the election or the candidate's fitness for public office." *Id.* at 40 n.27. But, in fact, applying the Intervenors' own analysis, those examples cannot be distinguished from the WRTL ads, and they only underscore that the Intervenors offer no workable standard at all.

First, they posit an ordinary commercial ad by an automobile dealership whose founder and namesake is a candidate. *Id.* But it seems plain that, by the Intervenors' logic, such an ad would promote that candidate's name and inherently remind voters of his business acumen and success; indeed, these could be qualifications that his campaign emphasizes.

Second, they posit a consulting firm that is in the business of ensuring compliance with the Sarbanes-Oxley law running an ad mentioning that statute where Rep. Oxley is a candidate. *Id.* But again, under the Intervenors' approach, such an ad surely would remind voters of Rep. Oxley's signature legislative achievement, which his campaign and others likely are emphasizing as a reason to reelect him.

Third, they posit "a candidate's business enterprise, named after him or her, sponsor[ing] a fall charity event every year and want[ing] to publicize it during an election year." *Id.* But, again, that public reminder of the candidate's business success, coupled here with a charitable good work, could be said to be highly influential to a prospective voter.[8]

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[8] Appellants' *amici* posit a similar ad that they deem to be acceptable under their equally vague proposed standard, namely, whether or not "[a] communication is unlikely to have any appreciable effect on voters' choices in an election." Brief *Amicus Curiae* of Richard Briffault and Richard L. Hasen in Support of Appellant and Intervenor-Appellants at 24

4. The Intervenors' approach is not only self-contradictory and incoherent, but also marks a notable and unexplained reversal. In the case at bar, the Intervenors acerbically characterize the district court's principal reliance on the text of the WRTL ads as a "'see-no-evil' approach" that "threatens to open the floodgates to renewed evasion of BCRA's regulations." *Id.* at 32. But in the FEC's rulemaking to implement § 203, the Intervenors urged the agency to adopt the following virtually *content-only* exemption from that prohibition:

> The term "electioneering communication" does not include any communication that: (x)(A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter; (ii) the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; and (iii) the communication refers to the candidate only by use of the term "Your Congressman," "Your Senator," "Your Member of Congress" or a similar reference and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the communication contains no reference to any political party. (B) The criteria in Para-

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(emphasis deleted) ("Hasen/Briffault Br."). *See also id.* at 27 ("it is quite plausible the [WRTL] ads could affect voters' choices"). These *amici* describe a baseball card corporation advertising its product by using "the name and likeness of a former baseball star who also happens to be the incumbent Senator running for reelection." *Id.* at 26. They say "it is highly unlikely that voters would use an ad so far removed from anything relevant to the candidate or his or her performance in assessing the candidate." *Id.* at 25-26. But celebrity in non-political fields is a demonstrably potent aspect of many successful candidacies— for example, Sen. Jim Bunning (baseball), Rep. Heath Shuler (football), and, of course, Gov. and President Ronald Reagan and Gov. Arnold Schwarzenegger (acting). Accordingly, these *amici* offer no objective and administrable mode of analysis either.

> graph (A) are not met if the communication includes any reference to: (i) the candidate's record or position on any issue; (ii) the candidate's character, qualifications or fitness for office; or (iii) the candidate's election or candidacy.

Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords at 10 (Aug. 23, 2002), www.fec. gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf). As the Intervenors then explained, "[t]his formulation allows individuals and entities concerned about legislation to run true issue ads with a legislative objective and a request to contact an elected official during the 30 or 60 day windows," because it "*assure[s] that the communication plainly and unquestionably is 'wholly unrelated' to any election.*" *Id.* at 11 (emphasis added). The Intervenors also urged the FEC to "preserve the 'bright line' quality" of the electioneering communication definition with respect to "entities other than parties or candidates" because it must "give clear guidance," and "[a]n exemption that creates uncertainty about whether a communication will be covered by the law undermines that crucial aspect of the definition . . ." *Id.* at 6.[9]

All of the WRTL ads at issue here satisfy the Intervenors' 2002 proposed exemption, save for their utterances of Sen. Feingold's actual name.[10] Nothing has changed since these

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[9] Appellants' current *amicus curiae* Common Cause also supported this exemption because it "protect[s] against the possibility that sham communications that are in fact campaign ads continue to escape [§ 203's] coverage." See Letter from Donald J. Simon to Mai T. Dinh at 12 (Aug. 22, 2002), www.fec.gov/pdf/nprm/electioneering_comm/comments/common_cause_and_democracy_21.pdf. Now, however, Common Cause excoriates the district court's similar analysis as a "magic features test" that would "eviscerate" § 203. LWV Br. at 6-8 and n.2.

[10] In their 2002 comments to the FEC, the Intervenors asserted that "prohibit[ing] use of a candidate's name makes it less likely that the ex-

2002 comments to require or warrant a different analysis—certainly not this Court's decision in *McConnell*, which essentially embraced the analysis that the Intervenors, as intervenors in that litigation as well, urged the Court to adopt. To be sure, while one's support of a discretionary *regulatory* exemption does not necessarily mean that one believes that it is *constitutionally* mandated, as noted above the Intervenors contended in 2002 that the exemption they supported "'plainly and unquestionably' is wholly unrelated to an election"—so, surely, it must neither have any "reasonable prospect . . . to be likely to influence the election," Int. Br. at 39, nor be "likely to have a material effect on voters' choices." *Id.* at 41. The Intervenors, who assured this Court in *McConnell* that as-applied challenges to § 203 would be justiciable, see Brief for Intervenor–Defendant Senator John McCain, *et al.* at 64, 74-75, *McConnell*, Nos. 02-1674, *et al.*, and then vigorously argued the opposite in *WRTL I*, have reversed field again in order to render the as-applied option that this Court recognized in *WRTL I* effectively a null set.

III. There Is No Governmental Interest in Suppressing Issue Advocacy Broadcast Messages

The Intervenors also contend that in *McConnell* the Court determined that issue advocacy "is entitled to no greater pro-

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emption will be used to accomplish an electoral objective." *Id.* at 11. Surely, that one circumstance has no legal salience. Since well before BCRA, a "clearly identified candidate" has been defined in part to include one who is referred to, without name or image, as "your Congressman" or "the incumbent." 2 U.S.C. § 431(18); 11 C.F.R. § 100.17. As Judge Leon stated below, the record in *McConnell*, including testimony by the AFL-CIO's communications director, demonstrated that actually naming an official was crucial to motivating constituents to contact him or her in response to an ad. *Wisconsin Right to Life, Inc. v. FEC*, 466 F. Supp. 2d at 207 n.19. That evidence was uncontested in *McConnell*. Moreover, if, as the Intervenors now say, the constitutionally significant context includes the fact that listeners may be assumed to know that Sen. Feingold supported judicial filibusters, see Int. Br. at 23, then surely they can be assumed to know the more elementary fact of his *name*.

tection under the First Amendment" than express advocacy, so § 203 may be applied where it is "impossible to disentangle" them. See Int. Br. at 42 n.28; *see also id.* at 19-20. Again, however, that inverts the teaching of *Buckley* that in such circumstances the First Amendment requires the censor to desist. And, while the Court has recognized a compelling governmental interest in regulating express advocacy and its "functional equivalent," it has never recognized any governmental interest at all in prohibiting corporate or union funding of *other* advocacy; and, the Government does not suggest any such interest now.

Indeed, in *McConnell* 540 U.S. at 206 n. 88, the Court stated that, "[a]s Justice Kennedy emphasizes in dissent, post, at 326-328, we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of issue ads," for "unusually important interests underlie the regulation of corporations' campaign-related speech," and "BCRA's fidelity to these imperatives sets it apart from the statute in *[First National Bank of Boston v.] Bellotti* [,435 U.S. 765 (1978)] . . . ," namely, a state criminal provision that barred corporations from making contributions or expenditures in connection with ballot measures other than those that materially affected themselves. In striking down that prohibition, the *Bellotti* Court reasoned that "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue," *id.* at 790, and corporate advocacy "affords the public access to discussion, debate, and the dissemination of information and ideas." *Id.* at 783 (footnote omitted).

That kind of advocacy exercises the right to petition the government, which is "one of the most precious of the liberties safeguarded by the Bill of Rights, . . . and . . . implied by the very idea of a government, republican in form," *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (interior quotation marks, citations and brackets omitted), and

is entitled to "a wide measure of 'breathing space' protection," *id.* at 531, quoting *New York Times Co. v. Sullivan*, 376 U.S. at 279. "At the heart of the First Amendment's protection" is speech on "'issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'" *First National Bank of Boston v. Bellotti*, 435 U.S. at 776, quoting *Thornhill v. Alabama*, 308 U.S. 88, 102 (1940). See also *Consolidated Edison Co. v. Public Service Comm.*, 447 U.S. 530 (1980) (state cannot preclude corporation from including with customer bills its own newsletter that discusses public policy matters).

And, where a speaker on *non*-electoral matters of public concern is a labor union, a corporation or some other organized group, no lesser or different First Amendment protection is at stake than it would be for a different speaker. "[T]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston v. Bellotti*, 435 U.S. at 777.

It bears emphasis on this point that absent a meaningful as-applied exception, § 203 proscribes *all* union- and corporate-financed broadcast references to *all* Members of Congress who are also candidates, even if they are literally unopposed for reelection or, as is the case for so many of them due to partisan gerrymandering, the "functional equivalent" of being so. Notably, the application of § 203 against WRTL that is at issue here concerns *a primary election in which Sen. Feingold was unopposed.* Under no formulation of an election-influencing standard could the "dangers" that inspired § 203 be considered to arise under that circumstance, as even some of the appellants' *amici* acknowledge. See Hasen/Briffault Br. at 25 and n.9. In *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 95 (1982), the Court stated

that "because minor party candidates are unlikely to win elections, the government's general interest in 'deterring the "buying" of elections' is 'reduced' in the case of minor parties," quoting *Buckley*, 424 U.S. at 70; and, that fact, coupled with evidence of past harassment, warranted under the First Amendment an exemption for a minor party from the State of Ohio's campaign contribution and expenditure disclosure requirements. *Brown*, 459 U.S. at 420-25. By a similar token, because a candidate who is *unopposed* in a primary election is *certain* to win, the governmental interest in regulating election-"influencing" speech is not just "reduced," but entirely absent.

The § 203 prohibition also applies to broadcast references to the incumbent elected leaders of the Executive Branch, the President and the Vice President, whenever either is a candidate for reelection or the Vice President is a candidate for the presidency, as was the case in every election from 1932 to 2004 (and in only 1952 was the incumbent President or Vice President not one of the eventual major-party presidential nominees). As both history and contemporary circumstances make clear, the *official* conduct of the President and the Vice President is a matter of the most acute public concern irrespective of their electoral ambitions and prospects. Yet § 203 uniquely insulates them from broadcast issue commentary.[11] There is no governmental interest, let

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[11] During the 2003-04 election cycle, the first to which BCRA applied, it was a federal crime for union- or corporate-financed broadcast advertising to refer in any manner to President Bush during substantial periods of time and locations while he was an *unopposed* candidate in primaries and caucuses for the Republican Party nomination; that prohibition continued throughout the 50 states with respect to both President Bush and Vice President Cheney during the 30-day period prior to the August 30 – September 2, 2004, Republican National Convention, even though their nominations were likewise uncontested; and, it then continued without pause during the 60 days remaining before the November 2 general election. Notably, in 2008 the two major-party conventions will be held

alone a compelling one, in barring genuine issue communications referring to the President, the Vice President or Members of Congress during those periods.

IV. The Appellants' Arguments Concerning WRTL's Separate Segregated Fund Should Be Rejected

There is also no constitutional basis for compelling unions and corporations to finance their genuine issue advocacy through a separate segregated fund.[12] The Government's and the Intervenors' arguments regarding the significance of WRTL's connected federal political committee should be rejected for three principal reasons.

First, accepting their arguments would impose a substantially disruptive burden on long-established and widespread organizational structures developed in reliance upon both FECA and the Internal Revenue Code. Appellants contend that the WRTL ads are tainted in purpose and effect by the distinct electoral activities of WRTL's PAC. However, that separate segregated fund is a distinct legal entity from its

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just before the 60-day pre-November 4 Election Day "blackout" period begins on September 4 – during August 25-28 (Democratic Party) and September 1-4 (Republican Party). Although it appears that no incumbent President or Vice President will then be a candidate, if this timing becomes the norm then in future elections then the 2004 experience is sure to be repeated.

[12] Although the Court has rejected the characterization of the segregated-fund requirement as a "complete ban" on corporate or union political activity, *see FEC v. Beaumont*, 539 U.S. 146, 194 (2003), it is most certainly fair to characterize § 203's proscription of union- and corporate-paid independent speech as a "prohibition," as this Court has done on both occasions that it has considered it. *See WRTL I*, 546 U.S. at ___, 126 S. Ct. at 1017; *McConnell*, 543 U.S. at 203. Section 203 itself was entitled "Prohibition of Corporate and Labor Disbursements for Electioneering Communications," 116 Stat. 81, 91, and, as codified, 2 U.S.C. § 441b(a), provides that unions and corporations are "prohibited" from making any "contribution or expenditure," including an "applicable electioneering communication." 2 U.S.C. § 441b(b)(2).

corporate sponsor, and the sponsor's control over it does not render the sponsor or its officers subject to the enforcement of laws barring the *sponsor* from making political contributions or expenditures. *See Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 401-32 (1972). FECA incorporates these principles. 2 U.S.C. § 441b(b)(2)(C).

Similarly, while the Internal Revenue Code precludes a § 501(c)(3) charitable organization from engaging in any partisan political activity, *see* 26 U.S. C. § 501(c)(3), it is well-established that a charity does not violate that prohibition simply because it is affiliated with a § 501(c)(4) entity that sponsors and administratively supports a federal political committee. See Internal Revenue Service ("IRS"), "Election Year Issues" 365-69, 473-80 (2003). Indeed, the Court has recognized the utility of the "dual structure" of § 501(c)(3) and § 501(c)(4) arms to enable an organization to pursue distinct objectives. *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983). For these reasons, innumerable organizations maintain multi-affiliate structures. But appellants' "taint" argument would render these various affiliation arrangements traps for the unwary.

Adoption of appellants' position would unconstitutionally burden WRTL and its PAC, for the PAC would no longer be available to provide "a constitutionally sufficient opportunity [for WRTL] to engage in express advocacy." *McConnell*, 540 U.S. at 203-05.[13] In *McConnell*, the Court invalidated BCRA's requirement that a political party forgo its First Amendment right to undertake express-advocacy independent expenditures if it (or an affiliated party committee) previously made coordinated expenditures with a party's nominee for

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[13] The Court's comment in *McConnell* that in "doubtful cases" such a fund may be used to pay for "genuine issue ads," 540 U.S. at 206, cannot be construed as a command that such a fund be used to finance an ad that merits an as-applied exception; if it were, there could be no such exception.

federal office, because this forced choice placed an "unconstitutional burden" on that right. *Id.* at 213-14. The invalid choice there was between "a constitutional right and a statutory benefit," 540 U.S. at 28; here, the invalid *de facto* forced choice is between two *constitutional* rights: a PAC's right to make independent expenditures and an affiliated § 501(c) organization's right to finance issue-oriented broadcast speech.[14] Section 203 cannot constitutionally force a speaker to make that choice.

Second, requiring a non-electoral entity like a union or a corporation to employ an electoral entity as the sponsor of its *non*-electoral message violates the First Amendment "principle of autonomy to control one's own speech." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995). *See generally Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 197-200 (1999); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988); *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 11 (1986). For, whenever a federal political committee makes a communication, it must both identify itself and either affirm or disclaim "candidate" authorization of its speech. 2 U.S.C. § 441d(a). This deprives the organization and its members of the "right . . . to advocate their cause" by "what they believe to be the

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[14] Although it is unclear whether or not any of WRTL's other communications about Sen. Feingold were confined to WRTL's members, insofar as they were the appellants presumably would consider them to be pertinent and discoverable "context." Yet the First Amendment precludes incursions by federal campaign finance laws on a union's or other membership organization's partisan internal communications, *see United States v. Congress of Industrial Organizations*, 335 U.S. 106, 121 (1948), and FECA explicitly provides that union and corporate internal communications "on any subject" are exempt from treatment as either "contributions" or "expenditures." 2 U.S.C. § 441b(b)(2)(A). If the exercise of such protected *internal* speech and association effectively forfeits a group's ability to undertake *external* issue speech, then that is also an unconstitutional condition on the exercise of those rights.

most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

Moreover, under a longstanding IRS rule, if the separate segregated fund of a § 501(c) organization "expends more than an insubstantial amount . . . for activities that are not for an exempt function [that is, election-influencing activity, see 26 U.S.C. § 527(e)(2)], during a taxable year, [then] the fund will not be treated as a segregated fund for such year," and all of its receipts will be taxed to its § 501(c) sponsor. 26 C.F.R. § 1.527-2(b)(1). Thus, compelling WRTL's separate segregated fund to pay for *non*-electoral advertising subjects it to a substantial risk of loss of its tax exemption.

Third, as applied to "genuine" issue speech, the segregated-fund requirement entails unduly complicated and burdensome administrative and other requirements. In *MCFL* the Court held that those burdens made it a "severely demanding task" for a nonprofit ideological corporation to engage in express-advocacy independent expenditures. 479 U.S. at 256. That burden is at least as severe for organizations that wish to broadcast speech that poses no greater threat of corruption or its appearance than does an *MCFL* organization itself. And, for unions and corporations that operate in a hierarchical, affiliated structure, typically only the national affiliate sponsors and controls a federal PAC, because FECA treats all affiliates of a national organization as comprising a single entity for purposes of political committee sponsorship, fund-raising and spending.[15] See 2 U.S.C. § 441a(a)(5); 11 C.F.R.

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[15] So, for example, there are over 30,000 labor organizations in the private sector alone, most of which are small organizations with modest treasuries, see "Record-Keeping Under the Labor Management Reporting and Disclosure Act (LMRDA): Do DOL Reporting Systems Benefit the Rank and File?", Joint Hearing Before the Subcommittee on Workforce Protections and the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce, 107th Cong., 2d Sess. 115-16 (2002), but there are only 283 union-sponsored federal political committees. www.fec.gov/press/press2006/20060714paccount.html.

§§ 110.3(a)(2)(ii) and (iii). Absent meaningful as-applied recourse, a typical organization coping with an immediate and unforeseen legislative problem would have to either create its own PAC to fund "electioneering communications" or try to persuade its national parent affiliate, perhaps on very short notice, to spend its PAC money—which it raised for contributions and express-advocacy spending—for that affiliate's non-electoral issue message. That consequence is constitutionally unacceptable.

V. The Court Should Not Foreclose the Possibility That Labor Organizations as a Class of Speaker Are Exempt From Section 203

The Court has long recognized and afforded protection to the vital role of labor organizations in the *non*-electoral public arena as advocates for legislation and public policies in the interests of both their members and all workers. *See generally Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991); *Ellis v. Bhd. of Railway and Airline Clerks*, 466 U.S. 435, 446 (1984); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 227-32 (1977); *Pipefitters Local Union No. 562 v. United States, supra; Machinists v. Street*, 367 U.S. 740, 767 (1961); *id.* at 798, 800-03, 812-816 (Frankfurter, J., dissenting); *United States v. United Auto Workers*, 352 U.S. 567, 578-86 (1957); *United States v. Congress of Industrial Organizations*, 335 U.S. at 115-21; *id.* at 143-46 (Rutledge, J., concurring). The case at bar provides no occasion to foreclose the question as to whether § 203 itself is constitutional with respect to labor organizations as a distinct class of speaker.

With the sole exception of *MCFL* corporations, *McConnell* did not distinguish among the various entities regulated by § 203 in analyzing the record of their broadcast advertising practices. And, in upholding the prohibition, the Court recited only its "prior decisions regarding campaign finance regu-

lation, which represent respect for the legislative judgment that the special characteristics of the *corporate* structure require particularly careful regulation." See 540 U.S. at 205 (emphasis added) (interior quotation marks and citations omitted). *See also* Hasen/Briffault Br. at 9 n.5. The Court did not explain why § 203 is constitutional as applied to *unions*.

In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665-66 (1990), the Court rejected the claim by a business trade association that the State of Michigan's proscription of corporate-financed electoral independent expenditures was fatally under-inclusive because it did not also apply to unincorporated labor organizations, explaining that unions have "crucial differences" from corporations: although unions too "may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure," and "the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a corporation's general treasury." In deciding the case at bar, the Court should not foreclose the ability of unions, or other entities regulated by § 203 whose claims are not now before the Court either, to make out a broader as-applied challenge on some future occasion.

CONCLUSION

For the reasons stated above, the Court should affirm the judgment below.

Respectfully submitted,

JONATHAN P. HIATT
LAURENCE E. GOLD *
AFL-CIO
815 16th Street, N.W.
Washington, DC 20006
(202) 637-5130

* Counsel of Record

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In The
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FEDERAL ELECTION COMMISSION,

Appellant,

vs.

WISCONSIN RIGHT TO LIFE, INC., ET AL.,

Appellees.

SENATOR JOHN McCAIN, ET AL.,

Intervenor-Appellants,

vs.

WISCONSIN RIGHT TO LIFE, INC., ET AL.,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

BRIEF AMICI CURIAE OF RICHARD BRIFFAULT AND RICHARD L. HASEN IN SUPPORT OF APPELLANT AND INTERVENOR-APPELLANTS

RICHARD BRIFFAULT
435 West 116th Street
New York, NY 10027
(212) 854-2638
FAX: (212) 854-7946

DAVID S. ETTINGER
HORVITZ & LEVY LLP
15760 Ventura Boulevard,
18th Floor
Encino, CA 91436
(818) 995-0800
FAX: (818) 995-3157

RICHARD L. HASEN
**Counsel of Record*
919 Albany Street
Los Angeles, CA 90015
(213) 736-1466
FAX: (213) 380-3769
rick.hasen@lls.edu

MARTIN S. LEDERMAN
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 662-9937

Attorneys for Amici Curiae

ARGUS LAW BRIEF PRINTING CO. (800) 225-6964

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INTEREST OF THE *AMICI CURIAE*

The individual *amici* are law professors who have devoted much of their careers to the study of election law, especially campaign finance law. Richard Briffault, the Joseph P. Chamberlain Professor of Legislation at Columbia Law School, has written 17 articles on campaign finance law, some of which the Court has cited in its campaign finance cases. *See, e.g., FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 462 (2001); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting). Richard L. Hasen, the William H. Hannon Distinguished Professor of Law at Loyola Law School, has written 18 articles (or parts of books) on campaign finance law, is the co-author of an election law casebook, *Election Law – Cases and Materials* (3d ed. 2004) (with Professor Daniel Hays Lowenstein), and the co-editor of the peer-reviewed quarterly publication, *Election Law Journal*. *Amici*'s affiliations are listed for identification purposes only.

With the consent of the parties, whose letters of consent have been filed with the Clerk of the Court, *amici* respectfully submit this brief in support of the Appellant Federal Election Commission and the congressional Intervenor-Appellants.[1] The brief suggests a test for as-applied challenges to section 203 of the Bipartisan Campaign Reform Act (BCRA), 2 U.S.C. § 441b(b)(2), that both protects First Amendment rights of speech and association and preserves the integrity of the election process through

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* and their counsel contributed monetarily to the preparation or submission of this brief.

reasonable limitations on corporate spending affecting federal elections.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves yet another attack on the 60-year-old requirement that corporations use separate segregated funds (or PACs), rather than treasury funds, to spend money in connection with federal elections. The Court has repeatedly addressed the PAC requirement, and has sustained its constitutionality, most recently three Terms ago in *McConnell v. FEC*, 540 U.S. 93, 203-11 (2003). The Court has done so not because election-related speech is entitled to less constitutional protection than other forms of political speech, but because, in the context of the election of public officials, legislatures and the Court have repeatedly recognized compelling justifications for regulations that might not be present, or as compelling, in other settings.

At the same time, the Court has recognized that the Constitution sometimes requires the creation of as-applied exemptions from otherwise permissible campaign finance regulations. As-applied exemptions are appropriate, the Court has explained, when the burden on speech in a particular application significantly outweighs any effect the regulation may have in promoting electoral integrity and other compelling legislative objectives – especially where a particular application of the law does not raise any of the concerns justifying regulation.

Thus, for example, in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Brown v. Socialist Workers '74 Campaign*

Comm., 459 U.S. 87 (1982), the Court created and applied an exemption from general – and constitutionally sound – campaign disclosure requirements for minor political parties that can demonstrate that disclosure of contributors' names would have an unusually severe chilling effect on the parties' and contributors' First Amendment activities. To similar effect, in *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 260-61 (1986) (*MCFL*), the Court held that the First Amendment requires an exemption for certain nonprofit corporations from a corporate PAC requirement similar to that at issue here, because applying the requirement to such nonprofit corporations would not further the government interests underlying the requirement.

The Court should adopt a similar approach to as-applied exemptions in this case. The regulation in question here is a 2002 enactment, section 203 of the Bipartisan Campaign Reform Act of 2002, which was aimed at ending widespread evasions of the corporate PAC requirement. This case presents the question whether and under what circumstances the Constitution requires *another* exemption to the PAC requirement for corporations, beyond the exemption recognized in *MCFL* and in BCRA itself in section 204. We respectfully submit that any as-applied exemption ought to build on the principles for identifying such exemptions that the Court developed in *Buckley*, *Brown*, and *MCFL*.

The district court below failed to follow the Court's guidance in these cases. It did not even attempt to tailor its proposed as-applied exemption to those advertisements that are unlikely to implicate the compelling government interests underlying section 203. Congress found, and the Court has agreed, that broadcast ads that name federal

candidates in the immediate pre-election period almost invariably have an impact on voters' choices in the election. Yet the district court would exempt many of those ads from regulation. If upheld by the Court, the district court's test would thwart Congress's objectives and return us to the days immediately preceding BCRA, when corporations easily evaded the PAC requirement.

We believe that a more appropriate test would exempt only those communications not implicating the governmental interests underlying the corporate PAC requirement. We propose that a corporation should be entitled to an as-applied exemption from the PAC requirement for electioneering communications *only when it proves that an identifiable type of communication is unlikely to have any appreciable effect on voters' choices in the election.* Following the approach Congress took in BCRA and the Court's analysis in *McConnell*, whether the corporation is entitled to an as-applied exemption for an ad must be based on a consideration of the context as well as the content of a broadcast advertisement.

The Court's task in setting the balance between the proper scope of election regulation of corporations and the protection of corporate speech is a difficult one. Both Congress and the Court struggled with it, and BCRA and *McConnell* have struck a workable and proper balance. Any as-applied exemptions should not subvert that balance.

ARGUMENT

I.

IN ITS CAMPAIGN FINANCE CASES THE COURT HAS CRAFTED AS-APPLIED EXEMPTIONS ONLY FOR ACTIVITY NOT IMPLICATING COMPELLING GOVERNMENTAL INTERESTS AND WHEN REGULATIONS IMPOSE UNIQUELY SERIOUS BURDENS ON FIRST AMENDMENT RIGHTS

The Court has repeatedly sustained regulations of campaign finance activity where such regulations are supported by compelling governmental interests specific to the election setting. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding disclosure requirements, campaign contribution limits, and other provisions of Federal Election Campaign Act); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (*Austin*) (upholding requirement that corporations engage in election-related advocacy through separate segregated funds); *McConnell v. FEC*, 540 U.S. 93 (2003) (upholding "soft money" and "electioneering communications" provisions of BCRA). The Court has done so not because election-related speech is entitled to less constitutional protection than other forms of political speech. To the contrary, speech and associational activity that supports or opposes candidates is entitled to the greatest constitutional protection. The election of public officials, however, provides compelling justifications for regulation that are not necessarily present in other settings.

For example, the Court has found that maintaining an informed electorate justifies laws requiring disclosure of information concerning contributions to and expenditures by candidates, political parties, and political committees that support or oppose candidates. *Buckley*, 424 U.S. at 66-67. So, too, the Court has repeatedly held that preventing

the corruption or the appearance of corruption of elected officials justifies contribution limitations. *E.g.*, *id.* at 29; *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000). Again, this is not because large contributions for political activities are not constitutionally protected, but because they raise unique dangers to the integrity of elections.

In upholding reasonable campaign finance regulations, however, the Court has also indicated that the Constitution sometimes requires the creation of as-applied exemptions from these regulations. The Court has carved out discrete as-applied exemptions either when substantial evidence demonstrates that a uniquely serious burden on First Amendment activities significantly outweighs any effect the regulation may have in promoting electoral integrity in a particular set of cases, or when the conduct of particular actors does not raise any of the concerns justifying regulation.

Thus, in *Buckley* and in *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), the Court created and applied an exemption from general – and constitutionally sound – campaign disclosure requirements: disclosure cannot be required when a minor political party shows its contributors, if identified, will be subject to "threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74; *Brown*, 459 U.S. at 93. In such a case, not only is there a unique First Amendment harm to the exempted parties; in addition, the required disclosure would do little to advance the voter information and anti-corruption goals that such disclosure ordinarily serves. *See Buckley*, 424 U.S. at 70 ("the governmental interest in disclosure is diminished

when the contribution in question is made to a minor party with little chance of winning an election").[2] When the limited regulatory benefit of applying disclosure to minor party candidates is combined with the demonstration that a particular minor party and its members have been subject to harassment, the First Amendment requires an as-applied exemption to the disclosure requirement.

The Court has used a similar mode of analysis in defining an exemption to requirements (such as that at issue here, in BCRA section 203) that corporations spend money on election-related activities only through "separate segregated funds," or PACs: the exemption is closely tailored to the absence in certain cases of the state interests justifying the regulation.

The Court has recognized that such PAC requirements are generally constitutional because they serve two compelling state interests.[3] *First*, such requirements eliminate

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[2] The Court in *Buckley* explained that "[a]s minor parties usually represent definite and publicized viewpoints, there may be less need to inform the voters of the interests that specific candidates represent." 424 U.S. at 70. Moreover, the concern that large donors may wield undue influence over officeholders is "reduced where contributions to a minor party or an independent candidate are concerned, for it is less likely that the candidate will be victorious." *Id.*; *see also Brown*, 459 U.S. at 96 n.11 ("In the case of minor parties, . . . their limited financial resources serve as a built-in expenditure ceiling which minimizes the likelihood that they will expend substantial amounts of money to finance improper campaign activities. . . . We cannot agree . . . that minor parties are as likely as major parties to make significant expenditures in funding dirty tricks or other improper campaign activities. . . . Moreover, the expenditure by minor parties of even a substantial portion of their limited funds on illegal activities would be unlikely to have a substantial impact.").

[3] The general constitutionality of a PAC requirement for corporate election-related spending was not litigated below and thus is not at

(Continued on following page)

a type of "distortion caused by corporate spending" in elections. *Austin*, 494 U.S. at 660. The distortion is the result of "state-created advantages" that permit corporations "to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" *Id.* at 659 (quoting *MCFL*, 479 U.S. at 257).[4] "As the Court explained in *MCFL*, the political advantage of corporations is unfair because '[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.'" *Id.*; *see also McConnell*, 540 U.S. at 205 ("We have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" (quoting *Austin*,

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issue here. *See Randall v. Sorrell*, 126 S.Ct. 2479, 2500-01 (2006) (Alito, J., concurring) (refusing to reconsider campaign finance precedent in *Buckley*, 424 U.S. 1, because issue was not properly before the Court). The only question in this case is whether Wisconsin Right to Life, Inc. (WRTL) is entitled to an as-applied exemption from the requirement for three advertisements it sought to broadcast with general treasury funds near the 2004 elections.

[4] "State law grants corporations special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets – that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments." *MCFL*, 479 U.S. at 258-59.

494 U.S. at 660)); *MCFL*, 479 U.S. at 257-59; *cf. FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209-10 (1982).

Second, the PAC requirement protects dissenting shareholders of corporations who oppose the use of their money to affect political campaigns. *See McConnell*, 540 U.S. at 204 (quoting *FEC v. Beaumont*, 539 U.S. 146, 163 (2003)); *Austin*, 494 U.S. at 673-75 (Brennan, J., concurring); *see also id.* at 665-66 (majority opinion); *MCFL*, 479 U.S. at 260; *cf. FEC v. Beaumont*, 539 U.S. at 154-55.[5]

The Court in *MCFL* held that the First Amendment requires an exemption from the longstanding PAC requirement for a certain category of nonprofit corporations whose electoral expenditures do not implicate these two state interests – namely, those that (1) rely solely on donations from ideological supporters rather than from commercial activities; (2) have no shareholders; and (3) do not take money from business corporations. *MCFL*, 479

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[5] These two rationales have been the dual justifications for Congress's restrictions on corporate election activity going all the way back to the Tillman Act of 1907. *See United States v. CIO*, 335 U.S. 106, 113 (1948). Since its inception in 1947, the federal PAC requirement has also applied to labor unions. As the Court recognized in *Austin*, there are "crucial differences between unions and corporations," 494 U.S. at 666, such that the government interests that justify the PAC requirements as to corporations do not necessarily apply in the same manner to unions, *see id.* at 665-66 (elaborating those differences). In *McConnell*, the Court held that the PAC requirement was constitutional as applied to unions, albeit without providing any rationale for treating corporations and unions alike. *See* Richard L. Hasen, Buckley *is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell *v.* Federal Election Commission, 153 U. PA. L. REV. 31, 56-57 (2004). Because of the additional constitutional questions that might arise with respect to application of the PAC requirement to unions, the discussion in this brief is limited solely to election-related spending by corporations.

U.S. at 259-65; *see also McConnell*, 540 U.S. at 210-11 (reiterating criteria in greater detail). In crafting these criteria, the Court ensured that the exemption would be carefully tailored in accord with the underlying justifications for the PAC requirement. Requiring such "*MCFL* corporations" to use PACs for political expenditures would burden their First Amendment activities *without* advancing the state interests that support the general regulation as applied to other corporations. With respect to such a corporation, "the concerns underlying the regulation of corporate political activity are simply absent. . . . It is not the case . . . that [the corporation] merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all." *MCFL*, 479 U.S. at 263.

The Court's treatment of as-applied exceptions in such cases should guide its analysis here, as well, where it is faced with a virtually indistinguishable corporate PAC requirement.

II.

THE COURT SHOULD CRAFT ANY AS-APPLIED EXEMPTION WITH REGARD TO THE COMPELLING INTERESTS CONGRESS SOUGHT TO PROTECT IN BCRA SECTION 203

Section 203 of BCRA is the latest amendment to the very well-established, decades-old regulation on *corporate* expenditures that the Court has reviewed in numerous cases. Congress has regulated corporate influence on federal elections for 100 years, since the Tillman Act of 1907, Pub. L. 59-36, 34 Stat. 864. *See Beaumont*, 539 U.S. at 152-53. Since 1907, "there has been continual

congressional attention to corporate political activity." *Id.* at 153. And for fully 60 years, since the Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, § 304, 61 Stat. 159-160, Congress has required that corporate *expenditures* in connection with federal elections must come from funds raised for that purpose, rather than from corporate treasury funds derived from shareholders. *See generally Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972) (construing the 1947 and 1972 versions of the PAC requirement); *see also id.* at 402-14 (canvassing the history of the regulation); *United States v. International Union of United Automobile Workers (UAW)*, 352 U.S. 567, 570-87 (1957); *MCFL*, 479 U.S. at 246-48.

In 1986, the Court construed the PAC requirement to apply only to expenditures for express advocacy (*i.e.*, ads specifically stating that viewers or listeners should vote for or against a particular candidate), so as to avoid a concern that the coverage of the law was too imprecise. *MCFL*, 479 U.S. at 248-49 (referring to *Buckley*'s vagueness concerns in an analogous context); *see Buckley*, 424 U.S. at 40-44. Within ten years, corporations had begun to exploit this limitation by spending significant sums of treasury funds for so-called "issue ads," that is, ads not expressly advocating a vote for or against a candidate, but instead criticizing or supporting a candidate's position on an issue and telling listeners to call the candidate about the issue. *McConnell*, 540 U.S. at 127-28 & nn.20-21; *see also* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEXAS L. REV. 1751, 1755-62 (1999) (setting forth ease by which corporations and others evaded FECA regulation).

Congress's response to this widespread evasion of the restrictions on corporate campaign spending was section 203 of BCRA. It applies the PAC requirement to "electioneering communications." Doing so eliminates the vagueness concerns that resulted in the Court's narrowing construction in *MCFL*, and as a practical matter puts corporations in much the same position they were in for several decades after Congress enacted its initial limitation on corporate expenditures in 1947. Under section 203 – and the definition of "electioneering communications" found in BCRA section 201 – the corporate PAC requirement now extends to expenditures for broadcast, cable, or satellite communications that refer to a clearly identified candidate for federal office, that are aired within 60 days before a general election or 30 days before a primary election, and that are aired to the candidate's constituency. 2 U.S.C. § 434(f)(3). Congress determined that by reason of their content, medium, timing, and targeting, such ads are "functionally identical in important respects" to express campaign advocacy even though they eschew the "magic words" of express advocacy, such as "Elect John Smith." *McConnell*, 540 U.S. at 126. In *McConnell*, the Court agreed, upholding the extension of the longstanding corporate PAC requirement to electioneering communications as defined by Congress. *Id.* at 203-09.

In so doing, the Court gave great weight to political realities and focused on the electoral significance of the ads' context – not merely to their words:

> [T]he unmistakable lesson from the record on this litigation, as all three judges in the District Court agreed, is that *Buckley*'s magic-words requirement is functionally meaningless . . . Not

> only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And *although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words*, they are no less clearly intended to influence the election. *Buckley*'s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system.

Id. at 193-94 (emphasis added); *see also id.* at 206.

The Court in *McConnell* concluded that BCRA's electioneering communication definition was not vague, *id.* at 194, and that the corporate PAC requirement for such electioneering communications is neither unconstitutionally underinclusive, *id.* at 207-08, nor unconstitutionally overbroad, *id.* at 205-07. The Court noted that the vast majority of ads that fall within the statutory definition are "clearly" election-related. *Id.* at 206. Moreover, the Court noted that corporations would not be unduly burdened by the regulation because they could continue to pay for political ads either by avoiding any specific reference to federal candidates, or "in doubtful cases by paying for the ad from a segregated fund," that is, a PAC. *Id.*

We respectfully submit that in determining whether any as-applied exemption to this rule is constitutionally required, the Court ought to build on the principles that it developed in *Buckley*, *Brown*, and *MCFL*.

In crafting as-applied exemptions in those cases, the Court identified discrete circumstances in which the constitutional balance between the burden on First

Amendment rights and the advancement of the state's interests was significantly different from the usual run of cases in which the regulation had already been deemed constitutional. In particular, the Court considered whether there were situations in which (i) the burden on First Amendment rights was greater than in the standard cases covered by the regulation; and (ii) the usual justifications for imposing that burden did not apply, *i.e.*, where the state interests are not implicated.

In this case – unlike in *Brown*, 459 U.S. 87; *see supra* pp. 6-7 – there are no circumstances in which BCRA's PAC requirement imposes *greater* burdens on First Amendment rights than the burdens imposed in the vast majority of concededly constitutional applications. In particular, application of section 203 to "electioneering communications" that are purportedly related to legislative initiatives does not impinge on corporations' protected speech any more than does the application of the PAC requirement to express advocacy itself. As the Court explained in *McConnell*, "the speech involved in so-called issue advocacy" is not "any more core political speech than are words of express advocacy." 540 U.S. at 205.[6]

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[6] "After all," the Court explained, "'the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office,'" and "'[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.'" *McConnell*, 540 U.S. at 205 (citations omitted). On this particular point, the entire Court in *McConnell* appeared to be in agreement. *See id.* at 328 (Kennedy, J., concurring in the judgment in part and dissenting in part).

The Court's decision in *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), is not to the contrary. In *Bellotti*, the state had foreclosed all means for corporations to engage in communications on

(Continued on following page)

Because application of section 203 to speech that is arguably more focused on legislative initiatives than on electoral choices does not raise *greater* First Amendment concerns than the core applications of the law that the Court has already approved, if there are to be any as-applied exemptions from that statute, it would only be under circumstances in which "the interests that justify the regulation of campaign speech might not apply." *Id.* at 206 n.88; *see also MCFL*, 479 U.S. at 263 ("the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL").

As noted above, *supra* pp. 7-9, Congress and the Court have identified at least two such interests – prevention of the "distortion caused by corporate spending" when a corporation uses funds secured by virtue of "state-created advantages," and protection of the prerogatives of dissenting shareholders – that are sufficiently compelling to justify the basic corporate PAC requirement, even as applied to core political speech.

The Court and Congress have identified one category of cases in which these two compelling governmental interests are simply not implicated – namely, application of the PAC requirement to so-called "*MCFL*-exempt" nonprofit corporations. *See McConnell*, 540 U.S. at 210-11 ("We presume that the legislators who drafted" BCRA

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certain referendum proposals. Under BCRA section 203, by contrast, corporations may engage in electioneering communications in a number of ways, including through a PAC that they may control. *See MCFL*, 479 U.S. at 259 n.12 ("The [corporate PAC requirement] imposed as a result of this concern is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in [*Bellotti*].").

section 204, 2 U.S.C. § 441b(c)(6)(A), extending PAC requirement to certain nonprofit corporations "were fully aware that the provision could not validly apply to *MCFL*-type entities.").

The Court has explained in *MCFL* and *McConnell* why the two state interests that ordinarily justify the corporate PAC requirement are inapposite to such nonprofit corporations. First, such groups do not use aggregations of wealth accumulated by virtue of the corporate form to espouse political advocacy with no correlation to the public's support for such ideas. Second, the shareholder-protection interest is not implicated, because "[i]ndividuals who contribute to [such a nonprofit corporation] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes." *MCFL*, 479 U.S. at 260-61; *see generally McConnell*, 540 U.S. at 210-11.

Wisconsin Right To Life, Inc. (WRTL) presumably satisfies two of the three criteria for an *MCFL* exemption: It "'was formed for the express purpose of promoting political ideas, and cannot engage in business activities,'" and "'it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings.'" *McConnell*, 540 U.S. at 210 (quoting *MCFL*, 479 U.S. at 264). Therefore, WRTL's use of its treasury funds, like that of most nonprofit advocacy corporations, would not implicate the state interests underlying BCRA section 203. WRTL would be free to use its treasury funds for both issue-oriented *and* direct electoral expression, but for the fact that it does not satisfy the final *MCFL* criterion: WRTL does *not* abide by a policy of declining to accept contributions from for-profit corporations. *See* Defendant Federal Election Commission's Supplemental Brief in Support of Motion for

Summary Judgment, *Wis. Right to Life, Inc. v. FEC*, No. 1:04cv01260, at 12 (D.D.C. Sept. 11, 2006), *available at*: http://electionlawblog.org/archives/fec-wrtl-supp%20msj.pdf (WRTL took contributions of up to $300,000 (including individual contributions of $50,000 and $130,000) from for-profit corporations).

This third requirement "'prevents [nonprofit] corporations from serving as conduits for the type of [otherwise prohibited] direct [corporate] spending that creates a threat to the political marketplace.'" *McConnell*, 540 U.S. at 211 (quoting *MCFL*, 479 U.S. at 264). This point is worth emphasis: The *only* reason section 203 applies to WRTL at all – as to any of its advertising – is because WRTL has opted to accept large amounts of money from the for-profit corporations that are the specific target of the section 203 PAC requirement. If WRTL would simply decline corporate funds to pay for political advocacy, then section 203 and FECA more broadly would not prevent it from using its treasury funds for *any* sort of advertising, including express advocacy.[7] Because it has chosen not to take advantage of the *MCFL* exemption, the burden of establishing eligibility for *yet another* type of as-applied exemption rests upon WRTL. *See Buckley*, 424 U.S. at 72-74; *Brown*, 459 U.S. at 93-94.

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[7] It is conceivable that some other nonprofit corporation that accepts very little money from for-profit corporations could demonstrate that in such a case the "conduit" concern the Court has recognized is inapposite because of the trivial amount of corporate funds received. If such a showing were made, then the Court would have to consider whether a "de minimis" exception to the final criterion of the *MCFL* exemption would be appropriate, and manageable. But no such proof has been offered here, presumably because WRTL accepts a great deal of money from for-profit corporations.

Instead of identifying a category of *speakers* that do not implicate the state interests underlying section 203 (as in *MCFL*), WRTL argues that there is a category of *broadcast advertising* that falls within the plain terms of the BCRA definition of "electioneering communications" but that somehow does not implicate the interests underlying the PAC requirement. *See* Appellee's Response to Appellants' Jurisdictional Statements, at 4 (the Court in *McConnell* "'assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads'" (quoting *McConnell*, 540 U.S. at 206 n.88)).

In order for WRTL to meet its burden, it must demonstrate that there is a category of so-called corporate "electioneering communications" as defined by Congress as to which corporate aggregations of wealth do not have the sort of "corrosive and distorting" effects on federal elections that justify the PAC requirement in the first instance, and that do not implicate shareholders' interests in not having their funds be used to affect federal elections.

We submit, however, that advertisements taking the form of "electioneering communications" as defined by Congress will invariably implicate such concerns *except in the unusual situation where it is unlikely that such advertisements would have an appreciable effect on voters' choices in the relevant election.*

The Court's decision in *McConnell* makes clear that whether or not an ad implicates the relevant state interests is a question that necessarily requires careful consideration of the electoral setting – of whether the ad could have the effect of influencing voters' decisions. The Court held that "issue ads" falling within the statutory definition generally

are the "functional equivalent of express advocacy," *i.e.*, that the "justifications that adequately support the regulation of express advocacy" apply as well to "significant quantities of speech encompassed by the definition of electioneering communications." *McConnell*, 540 U.S. at 206.

Of course, Congress's definition of "electioneering communications" does not correspond *exactly* to every advertisement that implicates the interests supporting the corporate PAC requirement. That definition does not, for instance, cover *every* ad that is likely to influence voters' choices in a federal election. See *id.* at 208 (explaining that the definition is not fatally underinclusive even though "it leaves advertising 61 days in advance of an election entirely unregulated"). Just as the definition – like any bright-line rule – is slightly underinclusive relative to Congress's objectives, perhaps it is likewise a bit overinclusive: There might be *some* ads covered by the definition that would be highly unlikely to influence voters' choices.

Appellees' primary argument appears to be that an as-applied exemption should be recognized where a corporation's ostensible purpose in broadcasting the advertisement is to influence legislative debates rather than (or in addition to) federal elections. There is some reason to think such ostensible non-election-related purposes would be pretextual in a significant number of cases. *See McConnell*, 540 U.S. at 206. But more fundamentally, it simply is not the case that "electioneering communications" would not implicate Congress's compelling interests even if the corporation might *also* intend for the broadcasts to have an impact on legislative debates.

Indeed, a corporation's *intent* in broadcasting such ads should be immaterial to the as-applied-exemption question. The state interests underlying the PAC requirement – the effects of corporate wealth on federal elections by virtue of state-conferred prerogatives, and the protection of shareholders against the risk that their money will be used to influence federal elections in ways that they do not approve – are implicated whenever such ads influence voters' choices, regardless of whether the corporation might have (or be able to articulate as a pretext) additional objectives for broadcasting such ads.

Thus, corporate intent should not be the touchstone for an exemption. The burden for a corporation such as WRTL must be to identify an easily distinguishable set of advertisements that fall within the definition of "electioneering communications" but that do not have any appreciable chance of actually influencing voters' federal election choices – because it is only such advertisements that would not implicate the compelling government interests underlying the 60-year-old requirement that corporations should use segregated funds to influence federal elections.

III.

THE DISTRICT COURT'S AS-APPLIED TEST IS NOT TAILORED TO THE COMPELLING INTERESTS CONGRESS SOUGHT TO PROTECT IN BCRA AND WOULD LEAD TO THE RE-EMERGENCE OF "ISSUE ADS" PAID FOR WITH CORPORATE TREASURY FUNDS THAT HAVE AN IMPACT ON FEDERAL ELECTIONS

The district court did not attempt to identify a set of advertisements that are unlikely to implicate the compelling government interests underlying section 203. Rather, it would create an exemption for any advertisement that "describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of legislative scrutiny in the near future," refers to the candidate's voting record, "exhorts the listener to . . . contact the candidate about the described issue," but then avoids references to an election or political party, and avoids expressly attacking or supporting a candidate. (Appendix to Jurisdictional Statement of Appellant Federal Election Commission (App. J.S.) 22a.)

This draws a roadmap for easily evading BCRA. Congress found, and the Court agreed in *McConnell*, that broadcast advertisements that name federal candidates in the immediate pre-election period have an impact on the election. Yet, the district court would exempt many of these ads from regulation. It is hard to imagine what campaign issue is not "currently the subject of legislative scrutiny or likely to be the subject of legislative scrutiny in the near future." (App. J.S. 22a.) Surely, it would be simple for a corporation to develop an election-period ad that takes an emphatic position on an issue, links a candidate

to the issue, criticizes the candidate's position on the issue (albeit not the candidate herself), and calls on voters to contact the candidate – all without referring to an election or party. As *McConnell* explained, "[l]ittle difference existed, for example, between an ad that urged viewers to 'vote against Jane Doe,' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *McConnell*, 540 U.S. at 126-27.

The district court's standard would once again enable corporations to use treasury funds to sponsor election-period ads that condemn Jane Doe's record on a particular issue before exhorting voters to "call Jane Doe and tell her what you think." Truly, under the district court's approach, the exemption would eat up the rule, and the very kinds of advertising tactics that BCRA was enacted to prevent would flourish again.

The district court determined that the as-applied exemption has to be decided solely by looking at the face of the ad, without any context. As the court explained, it limited "its consideration to language within the four corners of the anti-filibuster ads." (App. J.S. 22a.) This is flatly inconsistent with Congress's judgment in BCRA, and with the Court's opinion in *McConnell*. The lower court's test for as-applied challenges to section 203 ignores political reality by adopting a "see no evil" approach, devoid of context, for determining whether corporate treasury funds are being spent on election-period advertisements that are likely to have an appreciable effect on voter choices in federal elections.

The compelling government interests that justify regulation of corporate spending are not concerned with

the content of ads *per se* but with the potential impact of the corporate treasury funds on elections and on the rights of shareholders not to have their funds diverted to election campaigns. The content of the ad is, of course, a critical factor in determining whether an ad raises the concerns that justify regulation. That is why section 203 provides that a reference to a "clearly identified candidate for Federal office" is a prerequisite for regulation of the ad as an "electioneering communication." But as Congress and the Court have recognized, content cannot be the only factor. As BCRA and *McConnell* together make clear, context – including the timing of the ad and the medium of communication – matters, too.

If the lower court's as-applied test is allowed to stand, the corporate "issue ads" that Congress intended to subject to the PAC requirement in BCRA would likely return in full force, thereby leading once again to an irrational regime that might treat ads with virtually identical electoral impact differently, depending upon the presence or absence of magic words (in this case, any word that directly "promotes, attacks, supports, or opposes" a named candidate (J.S. App. 22a)).

Moreover, although WRTL in this litigation requests an as-applied exemption only as to BCRA section 203's PAC requirement, if the lower court opinion is allowed to stand, corporations and others would be able to ask for as-applied exemptions to BCRA section *201*, which uses the same "electioneering communications" test to trigger a *disclosure* requirement for election-related communications over a certain spending threshold. *See* 2 U.S.C. § 434(f). A broad as-applied exemption thus could lead to a situation in which the "sponsors of [issue] ads [will once again use] misleading names to conceal their identity."

McConnell, 540 U.S. at 128. This is a result that would thwart Congress's strong interest in mandating *effective* campaign finance disclosure, an interest eight of the Court's Justices upheld in *McConnell*. *Id.* at 196 (upholding section 201); *id.* at 321 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring and dissenting) (voting with majority to uphold the disclosure rules of section 201 except as to its "advanced disclosure" requirement).

IV.

THE COURT SHOULD HOLD THAT CORPORATIONS SEEKING AN AS-APPLIED EXEMPTION FROM THE PAC REQUIREMENT FOR "ELECTIONEERING COMMUNICATIONS" MUST DEMONSTRATE THAT A PARTICULAR BROADCAST ADVERTISEMENT IS UNLIKELY TO HAVE ANY APPRECIABLE EFFECT ON VOTERS' CHOICES IN A FEDERAL ELECTION

The as-applied exemption the Court should craft is one tailored to the substantial governmental interests that, according to the Court, justify the regulation of corporate election-related activity. We propose the following test: a corporation should be entitled to an as-applied exemption to the PAC requirement for electioneering communications *only when it proves that the communication is unlikely to have any appreciable effect on voters' choices in the federal election.*

For example, suppose a corporation wishes to use its general treasury funds to broadcast a television advertisement during the pre-election period concerning a pending

legislative issue that mentions an incumbent member of Congress who is running unopposed for reelection.[8] In such circumstances, an as-applied exemption might be warranted because in an uncontested election the advertising can have no appreciable effect on voters' choices.[9]

To give another example, imagine a corporation that sells baseball cards. It pays for a television advertisement of its products that is broadcast close to an election and

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[8] The Center for Responsive Politics reports that in 2006, candidates ran completely unopposed in 36 House races. Center for Responsive Politics, *2006 Election Analysis: Incumbents Linked to Corruption Lose, But Money Still Wins* (updated Nov. 9, 2006), http://www.opensecrets.org/pressreleases/2006/PostElection.11.8.asp.

[9] The issue is more complex when a corporation wishes to run a television advertisement in an uncontested *primary* election mentioning a candidate who will run in a contested *general* election. Such advertising may affect the general election. *See Christian Civic League of Me., Inc. v FEC*, 433 F.Supp.2d 81, 89 (D.D.C. 2006) (suggesting that electioneering communication mentioning Senator Olympia Snowe broadcast shortly before the 2006 Maine Republican primary for U.S. Senate "might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection"). Nevertheless, Congress has treated the primary and general elections as separate elections under BCRA, and therefore we would not rule out the possibility of an as-applied exemption for uncontested primary elections, depending upon the nature of the proof a corporation is able to adduce, notwithstanding a slight possibility that the pre-primary ads might affect general elections.

The question is not academic in the context of this very case. Senator Feingold ran unopposed in 2004 in the Wisconsin Democratic primary for U.S. Senate. *See* Wisconsin State Elections Board, Results of Fall Primary Election – 9/14/2004, at p. 2, http://165.189.88.185/docview.asp?docid=1382&locid=47. However, only part of the total electioneering communications period at issue in this case was due to the primary; on September 2, or two weeks before the primary, the 60-day general election period began.

includes the name or likeness of a former baseball star who also happens to be an incumbent Senator running for re-election. The corporation should be entitled to an as-applied exemption because such an advertisement, so entirely unconnected to anything relevant to the candidate or his performance in office, is unlikely to have an appreciable effect on the voters' decisionmaking.

Similarly, suppose a candidate has the same name as an automobile dealership within the district she seeks to represent in Congress – a business that she founded and is now operated by her daughter, who has the same name. The dealership could be allowed to run ads for its business in the pre-election period featuring the name common to the candidate, the dealership, and the current head of the business.[10]

Although this test would require application of some judgment (less in the case of the unopposed candidate, a little more in the baseball card and car dealership cases), the number of difficult cases would be few. The baseball card or car dealership ad will not have an appreciable effect on voters' choices because it is highly unlikely that voters would use an ad so far removed from anything relevant to the candidate or his or her performance in assessing the candidate. In contrast, WRTL's 2004 advertisements should easily fail to qualify for an as-applied exemption

[10] The FEC agreed in a 2004 determination. 2004-31 Op. FEC (2004) (Russ Darrow Group, Inc.), *available at* http://www.fec.gov/aos/2004/ao2004-31final.pdf. Although the FEC declined to create an exemption for all situations in which a candidate and a business shared a name – because such ads could often be used to promote the candidate – it found that in the particular circumstances of the dealership case an exemption was appropriate. *Id.*

(except arguably during part of the primary period, when Senator Feingold was running unopposed; *see supra* p. 25 n.9). A broadcast ad that refers to both a candidate and a campaign issue in the pre-election period is singularly unsuitable for an as-applied exemption, because such ads would almost certainly affect voters' choices about the named candidates. The WRTL ads are closely enough related to a candidate's performance and issues in the election that it is quite plausible the advertisements could affect voters' choices, as the dissent in the lower court below demonstrated, applying an appropriate contextual analysis. (App. J.S. 40a-47a.)[11]

The Court in *McConnell* recognized that political actors can understand context and make such common-sense judgments. In the few close cases that may arise, corporations may seek an advisory opinion from the FEC, *cf. McConnell*, 540 U.S. at 170 n.64, or "during those timeframes [] simply avoid[] any specific reference to federal candidates, or in doubtful cases [] pay[] for the ad from a segregated fund." *Id.* at 206.

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[11] It is noteworthy that the radio scripts for each of WRTL's ads included the following disclaimer: "Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee." (App. J.S. 3a-5a & nn.3-5.) The disclaimer plainly indicates WRTL's recognition that the ads would be perceived by the voters who heard them as electoral ads, thus confirming that even their sponsor understood they would have an electoral effect. Indeed, by specifically using the terms "candidate" and "candidate's committee," the ads employ the language of electoral ads, which reinforces their foreseeable electoral effect. Even under the district court's inadequate, content-only test, the ads' references to "candidate or candidate's committee" ought to render them electoral communications ineligible for any as-applied exemption.

To be sure, there would not be many cases in which corporations would qualify for as-applied exemptions. But corporations would continue to have significant protections for their First Amendment activities. *MCFL*-exempt corporations are not subject to the PAC requirement at all. They can spend their general treasury funds on such ads. (Recall that WRTL itself could qualify for such a sweeping exemption if it simply declines donations from other corporations.) Even for-profit corporations and corporations such as WRTL that do not qualify for the *MCFL* exemption continue to have many ways to engage in political activity, including:

- Spending on express advocacy and electioneering communications through a separate PAC (as WRTL has created (*see* App. J.S. 41a-42a));
- Internet, mail, and print advertising that avoids express advocacy;
- Broadcast advertisements, including ads that refer to federal candidates, that are aired outside the statutory pre-election period and that avoid express advocacy;

and

- Television or radio advertising broadcast close to the election that "simply avoid[s] any specific reference to federal candidates" (*McConnell*, 540 U.S. at 206).

CONCLUSION

Both Congress and the Court have long struggled to set the balance between the proper scope of election regulation and the protection of political speech. BCRA and *McConnell*

have struck a fair balance. Any as-applied exemptions to BCRA should not be allowed to subvert that balance.

The district court erred in its most recent opinion by applying a poorly tailored and constitutionally tone-deaf test for separating electioneering communications likely to influence voters' choices in federal elections from those unlikely to have such an effect. It would permit corporate use of treasury funds for speech that falls within the core of the constitutional justifications for BCRA's regulation. And it would exempt many electioneering communications from the reach of a statute Congress only recently adopted and the Court just recently sustained. Its judgment should be reversed. Any as-applied exemption the Court adopts should exempt only those electioneering communications that are not likely to have an appreciable effect on voters' choices in a federal election.

For the foregoing reasons, we urge the Court to reverse the judgment of the district court.

Respectfully submitted,

RICHARD BRIFFAULT
435 West 116th Street
New York, NY 10027
(212) 854-2638
FAX: (212) 854-7946

DAVID S. ETTINGER
HORVITZ & LEVY LLP
15760 Ventura Boulevard,
18th Floor
Encino, CA 91436
(818) 995-0800
FAX: (818) 995-3157

RICHARD L. HASEN
*Counsel of Record
919 Albany Street
Los Angeles, CA 90015
(213) 736-1466
FAX: (213) 380-3769
rick.hasen@lls.edu

MARTIN S. LEDERMAN
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 662-9937

Attorneys for Amici Curiae

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Nos. 06-969 and 06-970

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Appellant*,

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*.

SENATOR JOHN MCCAIN, *ET AL.*, *Appellants*,

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*.

On Appeals from the United States District Court for the District of Columbia

BRIEF OF *AMICI CURIAE* THE CENTER FOR COMPETITIVE POLITICS, THE INSTITUTE FOR JUSTICE, REASON FOUNDATION, THE INDIVIDUAL RIGHTS FOUNDATION, AND THE CATO INSTITUTE, IN SUPPORT OF APPELLEES

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
Counsel for Amici Curiae

March 23, 2007

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Van Orden v. *Perry*, 545 U.S. 677 (2005) 24

Statutes

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Other Authorities

Bradley A. Smith & Jason R. Owen, *Boundary Based Restrictions in Unbounded Broadcast Media Markets:* McConnell *v.* FEC*'s Underinclusive Overbreadth Analysis*, -- STAN. L. & POLICY REV. 101 (forthcoming 2007) 15

Dorie E. Apollonio & Margaret A. Carne, *Interest Groups and the Power of Magic Words*, 4 ELEC. L.J. 178 (2005) 10

Erik S. Jaffe, McConnell *v.* FEC: *Rationing Speech to Prevent "Undue" Influence*, 2003-2004 CATO SUPREME COURT REVIEW 245 (2004) 6, 23

Federalist No. 10, THE FEDERALIST PAPERS (Rossiter & Kesler eds. 1999) 5, 24

Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004) 17

Michael Delli Carpini & Scott Keeter, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996) 17

Nathaniel Persily and Kelli Lammi, *Campaign Finance After McCain-Feingold: Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004) 30

Stephen Ansolabehere & James M. Snyder, Jr., *Why Is there so Little Money in U.S. Politics*, 17 J. ECON. PERSPECTIVES 105 (2003) 22

Stephen E. Bennett & Linda Bennett, *Out of Sight Out of Mind: Americans Limited Knowledge of Party Control of the House of Representatives 1960-84*, 35 POL. RES. Q. 67 (1992) 17

INTEREST OF *AMICI CURIAE*[1]

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. Over the last decade, well over $100 million has been spent to produce ideological studies promoting campaign finance regulation. Those studies have gone largely unchallenged, and dominated the policy debate. CCP is concerned that a politicized research agenda has hampered both the public and judicial understanding of the actual effects of campaign finance laws on political competition, equality, and corruption. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process.

The Institute for Justice ("IJ") was founded in 1991 and is our nation's only libertarian public interest law firm. It is committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. IJ seeks a rule of law under which individuals can control their destinies as free and responsible members of society. IJ works to advance its mission through both the courts and the mainstream media, forging greater public appreciation for economic liberty, private property rights, school choice, free speech, and individual initiative and responsibility versus government mandate. This case involves just such a funda-

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

mental clash between freedom of speech, assembly, and petitioning on the one hand and repressive government mandates on the other, and thus touches the very core of IJ's mission and ideals.

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason Magazine, as well as commentary on its website, reason.com, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues. This case involves a serious threat to freedom of speech, assembly, and petitioning, and contravenes Reason's avowed purpose to advance "Free Minds and Free Markets."

The Individual Rights Foundation ("IRF") was founded in 1993. It is the legal arm of the David Horowitz Freedom Center ("DHFC"), a nonprofit 501(c)(3) organization (formerly known as the Center for the Study of Popular Culture). The mission of DHFC is to promote the core principles of free societies – and to defend America's free society – through educating the public to preserve traditional constitutional values of individual freedom, the rule of law, private property and limited government. In support of this mission, the IRF litigates cases and participates as *amicus curiae* in appellate cases, such as the case at bar, that raise significant First Amendment speech and associational issues.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited

government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case is of central interest to Cato and the Center because it addresses the further collapse of constitutional protections for political activity – including speech, assembly, and petitioning – relating to governmental policies and conduct, which lies at the very heart of the First Amendment.

SUMMARY OF ARGUMENT

1. The right to self-government at the heart of the First Amendment and our constitutional democracy assumes the full and free discussion of who to elect and what such officials are doing while in office. The past thirty years of campaign finance jurisprudence has pushed us a long way down a slippery slope to destroying such freedom. The evolution of this Court's cases has used numerous imperfect analogies to extend from their origin to where we are today. The justifications for regulation have thus become so attenuated and the burden of regulation so exacerbated, that it is time put the breaks on any further restriction of core political speech.

2. Grass-roots lobbying ("GRL") represents a virtually "perfect storm" of First Amendment activity, involving speech, association, and petitioning. It plays a central role in our constitutional system and should be protected to the fullest, especially in light of the restrictions on other forms of core political speech.

3. The burdens imposed on GRL by the restrictions at issue in this case are severe and far-reaching. The restrictions are content-based, target an especially effective form of GRL, and cover periods of time far greater than previously assumed. Any supposed alternate channels of communication for such GRL are inappropriate considerations in the context

of strict scrutiny, will quickly be characterized as loopholes for circumvention by the government's own reasoning in this case, and are not adequate alternatives in any event.

4. The government's asserted interests for suppressing GRL is much attenuated from the interests it once asserted in *Buckley*, and its anti-circumvention rationale is particularly dangerous and non-compelling. Circumvention as an interest simply distracts from the attenuated nature of the original risk and forms a self-fulfilling and self-perpetuating justification for ever greater restrictions. The original justifications of combating corruption and its appearance are not genuinely implicated by this case and are ill-conceived in any event insofar as they treat influencing elections through speech as corrupt. The communicative impact of speech is *precisely* the proper means for influencing the public, elections, and government conduct.

ARGUMENT

I. CAMPAIGN-FINANCE JURISPRUDENCE HAS STRAYED FAR FROM FUNDAMENTAL FIRST AMENDMENT AND DEMOCRATIC PRINCIPLES.

In our constitutional system predicated upon the sovereignty of the People, rather than the government, the most essential function of the First Amendment is to preserve the public's right to fully and freely discuss the qualities and conduct of their elected representatives in order properly to exercise their right to self-government. That fundamental democratic process operates not only in connection with the periodic decision of who shall serve as our elected representatives, but also in connection with the varied legislative and other actions those representatives take while in office. As this Court once recognized, the First Amendment has its "fullest and most urgent application" in the context of elections. *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971). And it has similarly urgent application in the context of discussions of

government policies and efforts to enlist the public to influence those policies.

The history of campaign finance regulation and jurisprudence has been a battle between such fundamental political freedoms and competing concerns that those very same freedoms could allow narrow private interests to control or manipulate government to their own parochial ends, to the detriment of the public interest as a whole. Such concerns are hardly new, and were known to the Founders as the problem of "faction." Today's concern over such factions, or so-called special interests, stems from the assumed ability of numerous groups and entities to exert improper influence through the aggregation and use of money to speak more, and more effectively, than they are supposedly due.

By contrast, Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small factions, but the "superior force of an interested majority." Federalist No. 10, THE FEDERALIST PAPERS 45 (Rossiter & Kesler eds. 1999). The solution to the danger of faction was not to replace conflicting factions with a single majority faction of the public, but rather to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id.* at 49. Any supposed concern with "special" interests thus misunderstands the entire problem of faction as it concerned the Founders. Far from being compelling, a desire to decrease or hobble special interests is anathema to the "republican remedy for the disease[]" of factionalism. *Id.* at 52. The proper remedy for a concern with factions is not to bind them, but rather to encourage their diversity and freedom to seek influence through speech, thereby allowing them to check each other with their conflicting efforts. The alternative – unfortunately now in ascendance – is to try to suppress the phenomenon of numerous factions "by destroying the liberty which is essential to its existence," but such remedy is "worse than the disease." *Id.* at 45-46.

With such basic principles in mind, a brief review of this Court's campaign finance jurisprudence will illustrate how far we have moved away from core First Amendment and democratic principles and how slippery is the slope upon which we now stand.

Over the past 30 years, this Court's protection of core political speech has eroded considerably. Indeed, the progression of this Court's jurisprudence from *Buckley* v. *Valeo*, 424 U.S. 1 (1976), to *McConnell* v. *FEC*, 540 U.S. 93 (2003), is a paradigm example of the proverbial slippery slope. What began as narrow exceptions to the First Amendment's jealous protection of political speech have now become the unchallenged starting points for attenuated analogies by the government used to support ever-expanding restrictions on core First Amendment activities. Where regulation based on the communicative impact of speech was once the greatest First Amendment sin, it is now precisely such impact – speech's ability to influence voters, and hence elections – that provides the government interest justifying regulation, as if influencing elections through *speech* was somehow corrupt.

In *Buckley*, this Court took the first steps down the slippery slope by upholding limits on the direct contribution of money to present and prospective officeholders. 424 U.S. at 25. Although such contributions were in no credible sense "bribes" and could, of course, only be used for speech and associated activities, this Court nonetheless viewed them as having the simplistic smell of bribes and the potential for actual or perceived corruption.[2] *Buckley* likewise denigrated the First Amendment value of candidate contributions as a form

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[2] Although calling such contributions "corrupt" was a stretch, there seems little point in revisiting the serious difficulties of that approach. *But see* Erik S. Jaffe, McConnell v. FEC: *Rationing Speech to Prevent "Undue" Influence*, 2003-2004 CATO SUPREME COURT REVIEW 245, 290-96 (2004) ("*Rationing Speech*") (critiquing the corruption rationale in *Buckley* and *McConnell*).

of expression and association by arguing that such contributions involved only symbolic and inarticulate expressions of support and ultimately produced only speech-by-proxy (the candidate) rather than speech by the contributor himself. *Id.* at 20-21.

Following that first, and imperfect, analogic leap from actual bribery to campaign contributions, this Court the took the next step down the slippery slope, analogizing coordinated private *expenditures* for speech to direct contributions to candidates. *Id.* at 46-47. Of course, that analogy again was far from perfect, insofar as even *coordinated* expenditures involved the direct speech of the private party, not merely speech-by-proxy, and limiting such expenditures undermined the effectiveness of such speech and free association. This Court in *Buckley* nonetheless seemed to think less of the value of such speech and saw similar dangers therefrom, perhaps due to its lack of independence and its potential for candidate control.

Buckley next looked at *uncoordinated* expenditures and concluded generally that such expenditures had a higher speech value and a lower danger of actual or perceived corruption and thus were worthy of greater protection. *Id.* at 44, 48. Despite that general recognition of protection, however, this Court proceeded to carve out a then-narrow exception allowing the regulation of independent expenditures for "express advocacy" of the election or defeat of a candidate, and thus took its most fateful step down the slippery slope. Understanding the reasons for, and the implications of, the express advocacy exception to First Amendment protection is critical to resolving the issues presented here.

In limiting the statutory restriction on expenditures "relative to a clearly identified candidate" to the narrow class of express advocacy of the magic-words variety, this Court ostensibly was responding to vagueness concerns raised by the broad statutory language. But in fact the statutory language was vague only insofar as it was overly *broad*, and many of

the concerns discussed by this Court involved such *overbreadth.* It was in that dual context that the Court discussed the inevitable blending of issue advocacy and the discussion of candidates as examples of speech that it thought could not be regulated consistent with the First Amendment. 424 U.S. at 42-45.

Seeming to recognize the questionable nature of its enterprise, this Court explained that a broader exception to First Amendment protection would be inappropriate because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, 424 U.S. at 42. *Buckley* resolved the inevitable overlap by drawing narrow and clear parameters for the speech that could be regulated: speech that used specific words of express advocacy. *Id.* at 43-44 &n. 52. Those parameters also had the benefit of preventing regulation of speech that this Court viewed as plainly protected, such as speech concerning the candidates in general and concerning issues of public interest, regardless of any overlap such speech might have with speech concerning the election. By excising from protection only exhortations such as "vote for," "elect," or "support" (and their converses), the Court implicitly found the loss of such statements to have less of an impact on the marketplace of ideas than would the loss of the broader discussions it protected.[3] Within the nar-

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[3] Viewing the bare exhortations of express advocacy as lower in value than broader discussions of candidates and issues helps explain why the seemingly arbitrary magic-words requirement may have made more sense than had appeared. The magic words were excised not because speech lacking such words had no impact on an election, but rather because the use of those words alone simply appealed to non-rational bases for decision, for example simple name recognition or a conditioned response to imperative speech as a reason to vote for a candidate. Absent such magic words, speakers had to persuade voters to reach such conclusions on their own, which required engaging their reasoning in order to draw a connec-

row category of express advocacy, however, this Court then found the analogy to contributions and coordinated expenditures close enough to allow express advocacy to be regulated as a means of preventing *circumvention* of the contribution limits. 424 U.S. at 43-44 & n. 52.

By the end of *Buckley*, this Court had moved three iterations away from its starting point that bribery was corrupt and could be regulated and, through increasingly attenuated analogies, permitted the regulation of higher value speech with only a tenuous connection to the underlying corruption rationales it had used to regulate contributions. And it had added the uniquely hazardous additional justification of preventing "circumvention" of prior restrictions on supposedly lower value contributions as a justification for regulating higher-value independent expenditures.

By the time this Court decided *McConnell*, *Buckley*'s initial corruption rationale had again expanded and was to be "'understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence.'" *FEC* v. *Beaumont*, 539 U.S. 146, 156 (2003) (citation omitted). The expansion also included additional reasons for restricting corporate political speech, including the supposed "special advantages" of the corporate form "that enhance their ability to attract capital and * * * to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace," and the prevention of corporations being used "as conduits for circumvention of [valid] contribution limits" by

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tion between the issue being discussed or the qualities of the candidate and the conclusion that the voter should vote for or against such candidate. Contribution limits and magic words restrictions thus could be viewed as an attempt to move election debates onto a higher plane of reasoned decision-making rather than to abandon them to naked exhortations and name-recognition exercises, activities which, in the age of advertising, some might view with suspicion and treat as lower-value forms of speech.

corporate owners or employees. *Beaumont*, 539 U.S. at 155 (citations and quotation marks omitted).

In *McConnell*, this Court used that expanded palette of arguments to extend the express advocacy concept – already attenuated – to speech that contained no such advocacy but that was characterized as the "functional equivalent" of express advocacy and pejoratively called "sham" issue ads. 540 U.S. at 206. Once again, however, the analogy was far from perfect, *see* Dorie E. Apollonio & Margaret A. Carne, *Interest Groups and the Power of Magic Words*, 4 ELEC. L.J. 178 (2005), and served to expand the scope of regulated speech to include increasingly higher value speech with fewer dangers of corruption or its appearance.

The question now confronting this Court is whether the express-advocacy exception – created by *Buckley* and expanded by *McConnell* – will swallow the rule.[4] Before answering that question, this Court should step back and survey the destruction from its three-decade slide down the slippery slope – the continued restriction of increasingly important categories of political speech based on ever more attenuated justifications. Even if this Court is unprepared to correct the errors of its earlier decisions, the very least it should do is stop extending those errors, starting with the recognition of meaningful First Amendment limits on BCRA as applied to grass-roots lobbying ("GRL").

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[4] It speaks volumes that appellants would answer that question with a resounding "yes." Indeed, they quote the very passage *Buckley* used to *limit* its restrictions on speech as a justification for expanding such restrictions. FEC Br. at 30; McCain Br. at 34-35. Rather than seeing *Buckley*'s recognition that "candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions," 424 U.S. at 42, as a reason it cannot suppress electoral advertisements, appellants proffer it as a reason why government should be free to *further* restrict the discussion of such important issues themselves.

II. GRASS-ROOTS LOBBYING IS CORE POLITICAL SPEECH, ASSEMBLY, AND PETITIONING ACTIVITY.

There can be no serious doubt that the GRL in this case lies at the very heart of the First Amendment. Discussion about and criticism of the government in general, our elected representatives in particular, and the various policies or actions being adopted and considered by them are both the essence of and the fundamental predicates for political participation by the People – the ultimate sovereign within our constitutional structure.

Few activities so perfectly combine the essential elements of concern to the First Amendment as does the exercise of the right to assemble and petition the government for a redress of grievances. It involves the discussion and exchange of ideas regarding government conduct among the people being assembled; it involves the communication of those ideas to the government and the individual members thereof whose job it is to represent us; and it involves the peaceful call for government action made by the very source of all authority in our constitutional system, the People. If the First Amendment has *any* remaining meaning as a binding restriction on Congress, surely it must mean that such activity cannot be restricted or burdened for anything less than the most compelling and immediate reasons, and even then to the least extent possible.

The specific activity under review in this case – grass-roots lobbying – is among the purest examples of such fundamental First Amendment activity. The advertisements in question directly address Senate filibusters of judicial nominees, a contentious public policy issue that was and will continue to be a major source of political conflict within Congress and throughout the country. The advertisements were directed to the ultimate source of legitimate government authority, the People themselves, and indirectly towards the relevant agents of the People, the Senators considering whether to filibuster. The advertisements likewise contained

a mixture of information (informing the people that filibusters had occurred and were threatened), argument (analogizing filibusters to various forms of obstruction, delay, and waste of resources), opinion (expressing the view that filibusters are bad), a call to action (asking people to contact their specific Senators and petition them to oppose the filibuster), and a means for many people to easily assemble to accomplish that action (a link to a website facilitating the petitioning of appropriate Senators).

In short, GRL in general – and the advertisements here in particular – represent virtually "perfect storms" of First Amendment activity, constituting speech, assembly, and petitioning, and facilitating further such activity by the public.

Finally, beyond the general and particular attributes of GRL described above, the evolution of other legal doctrines and developments has magnified the importance of GRL from a structural perspective, forcing it to shoulder more of the government-checking burdens that might instead have been borne elsewhere. In numerous cases seeking to invoke constitutional checks against legislative authority, this Court has adopted a highly deferential approach, advising us that if the public does not like the way the elected branches are exercising such authority they should take it up with their legislators, not with the courts.[5]

But that very advice to raise such issues with the legislature makes GRL all the more important because that is precisely what GRL does. GRL is now one of the few remaining

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[5] *See, e.g., Gonzalez* v. *Raich*, 545 U.S. 1, 33 (2005) (rejecting commerce clause challenge and suggesting resort to "the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress"); *Daniel* v. *Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949) (rejecting due process challenge and holding that the "forum for the correction of ill-considered legislation is a responsive legislature."); *Munn* v. *Illinois*, 94 U.S. 113, 134 (1877) (rejecting due process challenge and stating that "[f]or protection against abuses by legislatures the people must resort to the polls, not the courts.").

checks on a Congress that has accreted power far beyond that exercised in 1789 and that, in most cases, has little to fear from the deferential constitutional scrutiny applied by the courts. If such fundamental political activity is allowed to be constrained by the very Congress toward which it is directed, then the promise of political checks as adequate substitutes for constitutional checks rings especially hollow indeed. *Cf. United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). First Amendment protection for GRL thus represents the type of structural check without which other democratic processes cannot adequately function.

Insofar as the notion of government of the People, by the People, and for the People retains any value whatsoever in our constitutional system, there must be *some* firm First Amendment lines drawn and *some* ground upon which the government may not tread. Of the two fundamental expressions of the sovereignty of the People – advocacy regarding *who* to elect as our representatives and advocacy regarding *what actions* those representatives take while in office – the former is already heavily regulated and in no cogent sense "free." Such limitations on speech directly addressing *who* should be elected to office thus exponentially increase the value of remaining speech regarding *what* those elected officials should do while in office. GRL is precisely such fundamental speech, and should be protected vigorously.

III. BCRA'S BURDEN ON GRASS-ROOTS LOBBYING IS SEVERE AND FAR-REACHING.

On its face BCRA constitutes a content-based restriction expressly targeted to the communicative impact of GRL. Such restrictions are, by definition, substantial for First Amendment purposes wholly apart from their quantitative impact on the speech in question. *United States* v. *O'Brien*, 391 U.S. 367, 382 (1968) (discussing situation in which a

statute aimed at suppressing communication could not be sustained).[6]

A. BCRA Places Substantial Restrictions on Legitimate Grass-Roots Lobbying.

Even aside from the content-based nature of the restriction at issue here, BCRA uniquely targets large quatities of the most effective form of GRL.

First, the type of GRL restricted by BCRA in this case – broadcast communications in close proximity to an election that name specific Senators, one of whom was up for reelection, and that are targeted to those Senators' constituents – is the most meaningful, effective, and essential form of GRL one can imagine.

As was true in this case, Congress is often in session during the 30 days before a primary and the 60 days before a general election, and voting on issues that are important to the public. Issues under consideration before Congress do not go away as elections near, and the importance of GRL during that period continues unabated.

The timing of the communications during the run-up to elections is a critical factor enhancing their potential effectiveness. Representatives feel uniquely compelled to listen to the petitions of constituents precisely when those constituents are preparing to exercise their franchise. The public itself likewise is most focused on the actions of their representatives as elections approach and is then most inclined to be receptive to information, advocacy, and calls for action. The pre-election combination of official receptiveness and public

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[6] A content-based $1-per-year tax applied only to speakers who criticize elected officials would entail a substantial First Amendment burden notwithstanding that it would have essentially no impact on the number of critical speakers or the amount of critical speech, and even though it ostensibly would be viewpoint neutral.

focus thus makes the type of GRL at issue here uniquely vital to the democratic process

Furthermore, the 30/60-day restricted periods set forth in BCRA and assumed by this Court in *McConnell* vastly understate the actual amount of time GRL is restricted in election years. In a recent analysis of the 2004 election cycle, Former FEC Chairman Bradley Smith (a founder of *amicus* CCP) and his co-author demonstrated that BCRA had a far greater temporal impact than previously assumed. *See* Bradley A. Smith & Jason R. Owen, *Boundary Based Restrictions in Unbounded Broadcast Media Markets:* McConnell *v.* FEC*'s Underinclusive Overbreadth Analysis*, -- STAN. L. & POLICY REV. 101 (forthcoming 2007). That analysis found that because BCRA's restrictions are triggered not merely by primaries and general elections, but also by national conventions in presidential election years, they actually cover the additional 30-plus days before and during *each* such national convention. *Id.* at 108. Additionally, many broadcasters operate in multi-State media markets and reach 50,000 persons in more than one State. Where those States hold their primaries at different times, as they often do, the restricted periods under BCRA overlap and hence expand the total time during which GRL and other electioneering communications are restricted. In operation, the actual period of restriction is often more than 120 days in presidential election years, and can rise to over 200 days in the larger multi-State media markets. *Id.* at 126 (Table 1 summarizing the length of BCRA restrictions in 2004, including: 188 to 217 days in the Washington, D.C. media market across various stations covering 5 States and reaching 2.25 million persons; 196 to 198 days in the Chicago media market across various stations covering 4 States and reaching 3.43 million persons; 196 to 212 days in the Philadelphia media market across various stations covering 4 States and reaching 2.92 million persons; 184 days in the New York City media market across various stations covering 4 States and reaching 7.37 million persons). That greater

burden imposed by BCRA's actual operation renders faulty this Court's apparent assumption in *McConnell* that the length of the restriction was limited to a mere 90 days.[7]

Second, naming specific Senators and targeting the relevant electorate – otherwise known as the Senators' constituents – is an inherent and essential aspect of effective GRL. The very point of GRL is to influence congressional action on an issue of concern, and the only realistic means of doing so is to maximize the congruence between the would-be petitioners and the officials being petitioned. Petitions by non-constituents may not be wholly ignored, but those by the "relevant electorate," 2 U.S.C. § 434(f)(3)(2), cannot be ignored without political peril.

Specifically identifying the official to whom subsequent petitions should be addressed likewise is an integral part of any grass-roots lobbying effort. Generic criticism of government conduct without clear information and direction regarding what to do about it is but a pale shadow of effective assembly and petitioning. Providing information regarding how to contact the relevant decision-maker enhances the chances of subsequent petitioning activity by the target audience. The failure to identify the proper recipient of a proposed petition places the information-gathering burden on individuals, making it more difficult to assemble a large group to petition the

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[7] The differences between the assumed and the actual burden of BCRA likewise renders inapplicable *McConnell*'s facial analysis of the burden's and benefits of BCRA when considered in an as-applied challenge raised after such real-world data has become available. And, as the BCRA restrictions project further out from the general election, the likelihood that such restrictions will impact a greater percentage of genuine issue ads increases. At a minimum the new data gives this Court ample reason to limit its holding in *McConnell* to the abstract facial questions presented therein, and to give that ruling little weight (or to reconsider it entirely) when it comes to resolving challenges such as the one in this case.

government.[8] Naming names thus lies at the heart of effective GRL and likewise at the heart of the First Amendment.

Third, the GRL at issue here – promoted and organized through broadcast media – is also a singularly effective and vital form of such First Amendment activity. This Court itself once recognized that broadcast media are "indispensable instruments of effective political speech." *Buckley*, 424 U.S. at 19. Indeed, the very reason broadcast communications are more heavily restricted by BCRA is *precisely* because they are more effective at reaching the target audience and hence "influencing" elections. What is accepted by this Court and Congress regarding the greater effectiveness of broadcast communication to influence elections necessarily requires acknowledgment of the unique effectiveness of such communications as the means for GRL to inform, encourage, and enable the public to further petition their representatives.

B. Alternative Avenues of Communication are Inappropriate, Inadequate, and Short-Lived Justifications for Restricting Core Political Speech.

Appellants repeat the argument, raised in *McConnell* and elsewhere, that the First Amendment burden here is minimal because there are adequate alternative channels of communi-

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[8] *See* Michael Delli Carpini & Scott Keeter, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 69-71 (1996) (citing studies demonstrating that most Americans do not know where in government responsibility lies for setting and carrying out most government policies); Stephen E. Bennett & Linda Bennett, *Out of Sight Out of Mind: Americans Limited Knowledge of Party Control of the House of Representatives 1960-84*, 35 POL. RES. Q. 67 (1992) (most Americans do not know which party controls Congress, and hence need names in order to act to properly communicate preferences); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1309 (2004) (citing data showing that during the campaign most voters in elections cannot name a single candidate).

cation for engaging in GRL. FEC Br. at 35-36; McCain Br. at 29-31. That argument is flawed for a variety of reasons.

First, even asking the question whether adequate alternative channels of communication exist for core political speech is inappropriate in the context of strict scrutiny of the content-based regulation of GRL in this case. Where a regulation is content-based, the First Amendment burden is severe by definition and is not diminished by the potential for speakers to communicate in a different manner preferred by the government. In fact, consideration of alternative channels of communication only makes sense in the context of neutral time-place-manner restrictions and conduct regulation that only incidentally burden speech because many government actions can *affect* speech without in any real sense abridging the freedom of speech, and strict scrutiny in all such cases would grind government to a halt.[9]

In this case, however, BCRA's restrictions on electioneering communications are imposed precisely based on the content of the speech and for the very purpose of suppressing their communicative impact, *i.e.*, their potential for persuading voters and thereby potentially influencing elections.[10] To import the reasoning of adequate alternative channels of

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[9] The obvious examples are ordinary income or sales taxes, noise ordinances, and parade permits, each of which can reduce total speech but is not targeted to the content or communicative impact of such speech.

[10] *See Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994) ("Government action that stifles speech on account of its message * * * pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."); *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 790-91 (1988) ("'The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.' * * * To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.") (citation omitted).

communication into this context is thus a troubling and dangerous extension of a narrow line of cases and contributes to the downhill slide in First Amendment protections for core political speech.

Second, what the government today relies upon as mitigating alternative channels of communication will inevitably be derided tomorrow as means of circumventing the latest restrictions. Indeed, insofar as any of the alternative channels are in fact "adequate" to inform members of the public about the activities of their elected representatives and persuade them to take action directed at such officials, such alternatives will likewise carry the same risk of influencing an election under the exact same reasoning the government employs here.[11]

If this Court accepts the "influence elections" and circumvention arguments made by the government in this case, there will be no coherent stopping point for rejecting those arguments when the next channel of communication is shut down. Any arbitrary lines drawn now drawn by BCRA between regulated and unregulated channels of expression will seem just as arbitrary in the face of the government's future arguments as the "magic-words" test seemed in *McConnell*. In fact, once the current restrictions shut down the type of GRL at issue in this case, alternate forms of communication will necessarily assume a greater prominence (even if they are less effective), and hence today's restrictions will affirmatively create tomorrow's supposed dangers from other forms of speech. Each time one avenue for political speech is closed, those remaining will become more important, and thus more likely to create "corruption" or its appearance, thus justifying their regulation.

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[11] Indeed, various States, taking their cue from *McConnell* and BCRA have already adopted restrictions on electioneering communications that are not limited to speech through broadcast media and cover many of the supposed alternative channels of communication.

Indeed, that is precisely what happened in the shift from express advocacy to so-called issue ads, and it is even happening again today in connection with 527 organizations, which were once touted as a safety valve for independent speech but are now being attacked as a loophole allowing circumvention of BCRA. In short, the government and this Court simply cannot have it both ways, simultaneously touting the First Amendment benefits of other avenues of communication and then treating them as mere loopholes that cannot be allowed to circumvent the latest round of restrictions.

Third, none of the supposed alternative channels are in fact adequate replacements for the GRL in this case.

Avoidance. The option of simply avoiding BCRA's timing, broadcast, or candidate-identification triggers is not an *adequate* alternative given that those triggers are the very same elements of the most effective GRL. *See* Part III.A, *supra* at 14-17. Indeed, the very point of BCRA limiting its regulation to broadcast media during the run-up to elections was *precisely* because those ads were the most effective form of communicating with the public in a meaningful manner and that the other forms of communication left open were supposedly less dangerous because of their diminished communicative effectiveness. And, as applied to GRL in particular, closing off the most effective channels of communication will have a cascade effect reducing not just the regulated speech itself but also any resulting petitioning activity as well.

PAC Funding. The so-called PAC option likewise is not an adequate alternative. Any previous notion that establishing and maintaining a PAC is a minor administrative task has become increasingly incredible with each new round of legal obligations and restrictions on PACs and those who run them. Just the legal fees, record-keeping, and reporting requirements alone can be daunting, making it costly or impossible for ordinary citizen groups to engage in robust and effective GRL. The PAC option thus reserves the most effective ave-

nues of communication for large and well-funded entities who have ready access to existing institutional resources and expertise.

The various funding source, amount, and disclosure requirements for PACs likewise make it especially difficult for new or smaller groups, with severely restricted numbers of persons from whom they can solicit funds, to raise the quantities of PAC money needed for broadcast communications. Indeed, the very facts of this case demonstrate that the PAC resources available to groups like WRTL can be wholly inadequate to enable them to use broadcast media for their message. WRTL Br. at 9-10 & n. 17[12]

Furthermore, because the funding-source limits on the PAC option disproportionately hurt smaller organizations, BCRA tilts the GRL playing field in favor of larger and better-organized entities and commercial entities with greater resources. As a practical matter, the burden of the PAC option will fall on precisely those "grass-roots" groups that rise up in timely response to current issues, but will have less of an impact on the large institutional "special" interests that were of supposed concern to Congress. Constraining effective GRL also will shift power and influence regarding legislative issues to incumbents, who have far better alternatives to get out their message in the context of pushing legislative agendas and garnering free media attention. That shift gets things precisely backward, with incumbent representatives able to lobby the public through the mass media, but the public unable to organize and lobby the incumbents through the same means.

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[12] Using the PAC option for GRL also would compete with other uses for PAC money. Limited PAC resources are already the only means for nonprofit and other corporations to make contributions or to engage in express advocacy. Expanding the scope of First Amendment activity forced through the PAC option thus decreases the amounts available for each type of protected activity and places a fixed limit on the covered expressive activity by those organizations.

IV. THE GOVERNMENT INTEREST IN SUPPRESSING GRASS-ROOTS LOBBYING IS ATTENUATED AND NOT COMPELLING.

The purported government interest at issue in this case is the asserted but unproven *hypothesis* that GRL organized and advocated by a corporation using general treasury funds has the potential to "corrupt" or exert "undue influence" upon political office holders who might be thankful for such efforts or to cause the appearance of such corruption or undue influence. That hypothesis is flawed both in its conception of "corruption" generally and in its application to GRL in particular.

A. Corruption and Its Appearance Are Distant Concerns and "Circumvention" Is a Never-Ending Excuse for More Regulation.

As described in Part I, the government's original interest in fighting corruption and the appearance of corruption has become more and more attenuated with each effort at further regulation. While the corruption interest was never well-reasoned, even in connection with direct contributions to candidates,[13] the interest is now really one of avoiding supposedly "undue" influence and preventing circumvention of the last round of regulations, which in turn were justified as preventing circumvention of earlier restrictions, which eventually were tied to the underlying purpose of avoiding corruption or its appearance. That circumvention rationale, however, becomes more faulty with each iteration.

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[13] *See* Stephen Ansolabehere & James M. Snyder, Jr., *Why Is there so Little Money in U.S. Politics*, 17 J. ECON. PERSPECTIVES 105 (2003) (examining 36 published, peer reviewed studies on effects of money in U.S. politics since 1981, and concluding, "the evidence that campaign contributions lead to substantial influence on votes is rather thin * * *. Money has little leverage because it is only a small part of the political calculation that a re-election oriented legislator makes.").

To begin with, no one seriously suggests that the GRL in this case involves the actuality or appearance of anything resembling true "corruption" as conceived in *Buckley*. Rather, the interest now is in preventing the actuality or appearance of that dim shadow of corruption – "undue influence" – and the prophylactic prevention of "circumvention" of previous restrictions on speech. The notion of undue influence, however, is an ill-defined snake pit, without any coherent baseline of what amount or type of influence is "undue" and what influence is simply part of the ordinary democratic process. *See Rationing Speech*, 2003-2004 CATO SUPREME COURT REVIEW, at 295-96. Such a vague and attenuated interest hardly qualifies as compelling even by its own uncertain terms.

Worse still, an asserted interest in prophylaxis against circumvention is at best a diversion and at worst a self-fulfilling justification for never-ending rounds of further regulation. If abstracted from the original supposed evils of corruption via bribery or even supposedly via large contributions to candidates, the mantra of circumvention tends to hide how much disfavored conduct is actually leaking through the earlier legislative barriers and hence obscures the magnitude (or lack thereof) of the underlying interest. Surely the government could not claim – and this Court could not accept – that contribution limits themselves have *no effect* on corruption or its appearance or that circumvention of those limits is 100% effective at generating the same amount and perception of corruption.[14] Likewise with the restrictions on coordinated expenditures and on express advocacy. If we are to accept the validity of such restrictions in the first place, we must assume that they are effective in preventing some meaningful portion

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[14] If such were in fact the case, the initial limits would presumably be unconstitutional for failing to directly advance the interests asserted.

of the evil at which they were directed.[15] With each new layer of regulation, therefore, the remaining harm to be avoided necessarily diminishes and the importance of the new speech being regulated necessarily increases. Those two curves must cross at some point and, short of overruling past cases (which would make the *most* sense and be most faithful to the First Amendment), GRL seems to be a sensible place for the balance to shift. Multiple layers of prophylaxis simply address more and more attenuated risks of the underlying danger and at some point such risks must cease to present compelling interests.[16]

In addition to diverting attention from the diminishing government interest, an anti-circumvention interest inevitably feeds upon itself, with each new restriction spawning supposed circumvention and the need for further restrictions. *See* Part III.B, *supra* at 19. Indeed, if preventing circumvention is accepted as an independent compelling interest, then all alternative channels of communication could readily be re-characterized by the government as circumvention of previ-

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[15] Even assuming each layer of regulation was only 50% effective in preventing corrupting conduct, three layers of prophylaxis would presumably eliminate 87.5% of the objectionable behavior. The proper question after that is not whether avoiding circumvention *per se* is a compelling interest, but rather whether the marginal gains in prophylaxis (for example another 6.25% for a fourth layer of prophylaxis in the example above) is sufficiently compelling to justify substantially expanding restrictions on larger and larger quantities of ever higher-value speech.

[16] Surely this Court must weigh the *magnitude* of a risk, not merely its abstract character, to decide whether it is a compelling justification for a particular restriction or application. *Cf. Van Orden* v. *Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment) (Establishment Clause analysis a matter of "degree" in close cases; finding that a mixed message including some religious component did not establish religion). Because mixed messages in political debate may be inevitable to some extent, the only way to eliminate *all* risks associated with election-related speech is to eliminate all freedom of speech, a solution that is anathema to our constitutional system. *Cf.* Federalist No. 10, THE FEDERALIST PAPERS 45-46.

ous limitations that simply did not reach far enough. Nothing would be immune from such a justification, which would not disappear until all speech with any possible impact on elections were restricted or perfectly equalized in a perverse echo of the one-person-one-vote principle.

In the end, it is more than passing strange to characterize efforts to maximize First Amendment activity up to, but not crossing, the boundaries of existing restrictions as "circumvention" of those restrictions unless one wrongly assumes that virtually *any* effort to influence who gets elected and what actions they take is unacceptable. Effective political speech and association used to influence government are not means of *circumventing* restrictions on supposedly improper influence. Rather, they are the constitutionally favored alternatives for achieving desired ends *without* force, bribery, or other improper means.

B. There Is No Risk of Actual Corruption or Even "Undue" Influence.

The particular ads in this case present no risk of corruption or undue influence, and amply demonstrate how far the government has strayed from any legitimate interests it might have.

First, the messages in this case do not discuss the positions of the named officials regarding judicial filibusters, but rather simply ask the public to petition the Senators to oppose the filibuster. There is no indication of candidate support or opposition in the ads. Any implicit support of or opposition to a candidate from such communications will depend largely on the candidate's response to the ensuing petitions and the public's independent investigation of such issues.

Indeed, insofar as any support or opposition to a candidate can only be inferred by the audience from the overall context of the election or other external sources in combination with the GRL at issue, that simply demonstrates the unique First Amendment value of GRL and distinguishes it from other

forms of speech that this Court has allowed the government to regulate. As noted in Part I, *supra* at 6-9, *Buckley*'s denial of protection to contributions, coordinated expenditures, and express advocacy seemed to derive in part from the express or implicit assumption that such expression were somehow less worthy under the First Amendment, being either symbolic and undifferentiated in message, lacking independent control or contribution to the marketplace of ideas, or constituting merely conclusory exhortations to action. But where speech consisted of independent discussion of issues, even where such discussion inevitably would touch upon *candidates*, this Court protected such speech notwithstanding its potential to influence elections.

The lesson of such treatment thus illustrates the overarching principle that what such regulable forms of speech have in common, and what differentiates them from protected speech, was a perceived lesser contribution to the marketplace of ideas, the speech being either inchoate, in control of a proxy, or a bare exhortation lacking analysis. When asking whether other speech is thus the "functional equivalent" of express advocacy, it is those qualities that must be the touchtone, not the potential to influence elections that was equally present in the speech *Buckley* protected.

Applying the above principle, the GRL in this case is not even remotely the "functional equivalent" of the express advocacy in *Buckley*. Any conceivable election impact from the GRL here would be entirely the result of educating the audience on *issues* and then the audience using such issues to evaluate candidates – the seemingly ideal form of democratic persuasion and decision making. Insofar as the express advocacy in *Buckley* was unprotected because the particular words "vote for" may have been deemed of limited First Amendment value – perhaps suspected of influencing the public through bare name recognition or Pavlovian response ("We Like Ike," repeat 100 times) – that is certainly not the case here.

At *worst* the GRL ads in this case represent the direct discussion of issues that are unavoidably intertwined with the discussion of candidates because they are issues that the candidate is continuing to address in his ongoing legislative duties. The speech here not only encourages voter awareness, but in fact cannot have any impact on the election without the further step of active voter attention to and participation in the marketplace of ideas in order to draw any connection between the ads themselves and the various extrinsic circumstances and information upon which appellants rely to claim a purpose and effect of influencing elections.[17]

Ultimately, if discussion of a candidate's current legislative activities has some indirect influence on that candidate's election, such effect is entirely proper, squarely within the core concerns of the First Amendment, and hardly undue, corrupting, a sham, or any other pejorative the government might choose.

Second, the timing of broadcasts in the run-up to the election does not raise the inference that the GRL ads are "shams." Importantly, the timing coincided with the timing of the Senate filibusters from which the relevant legislators were being asked to abstain. The issues subject to GRL do not simply stop as an election approaches, and neither should the right to engage in effective lobbying. And, as described in Part III.A, supra at 14-17, proximity to an election is when GRL can be most effective. Timing advertisements for such period thus is less indicative of a sham than of a desire to

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[17] Even assuming some implied electioneering content to GRL, whether the ads in this case or even future ads that negatively identify a candidate's legislative position, at best such GRL would involve a *mixed message*, not a sham. Such mixed messages are precisely what *Buckley* referred to, and sought to protect, when limiting restrictions to express advocacy in the form of bare exhortation rather than argument and, as a practical matter, do not pose the same risks of *undue* influence. Any influence exerted is due entirely, and properly, to the desirable functioning of the marketplace of ideas.

capitalize on election interest to further the *issue* advocacy itself. The analogy to direct advocacy and even to "sham" issue ads such as those attacking a politician personally and then mentioning some policy issue in passing is thus considerably weaker and the government interest in regulating such speech is even more attenuated.

Third, the notion that GRL might pose a particular danger when coming from a corporation is, at a minimum, more attenuated for a non-profit corporation, and is truly a stretch in the context of speech the ultimate influence of which is determined by the demonstrable support it receives from the public in the form of resulting petitions to elected officials. Insofar as the perceived unfairness of corporate wealth being used for expenditures is premised on the notion that corporations can generate speech and influence out of proportion to the strength or support behind their ideas and hence beyond the amount of speech and influence they *ought* to have, that begs the question of what is the "proper" amount of speech and influence.[18]

Furthermore, in the context of GRL, the danger of *undue* influence is limited at best because any supposed influence from such ads will presumably be a function of how many people actually follow the advice of such ads and petition their representatives. Even accepting that such resulting activity might have an influence on an election, it is hardly *undue* in that it is directly tied to the amount of public support generated by the speech in the readily identifiable form of a

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[18] Though failing in its application, *Buckley* at least correctly recognized that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48. That, said *Buckley*, is "wholly foreign to the First Amendment," the protections of which "cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 48-49. Manipulating different groups' relative ability to speak "is a decidedly fatal objective." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 579 (1995).

petition. We thus have a direct measure of the effectiveness of the GRL and hence the actual and perceived influence of the organizer will be in direct proportion to the number of people who act on the advice given, not simply on the dollar amount spent on the ad. If nobody responds to the ad it will presumably have no influence on the candidate or the election; if many people respond to the ad, then the magnitude of the potential influence will be a function of such voter support and hence not undue.[19]

C. Avoiding the Mere Appearance of Corruption Is Not a Compelling Interest and Is Not Advanced by Restricting Grass-Roots Lobbying.

In the absence of actual corruption, avoiding its mere appearance should not be sufficient to suppress protected speech. The proper First Amendment remedy for such false appearances is more speech, not less, the election of candidates voluntarily practicing the public's notion of virtue, or, ultimately, a constitutional amendment if the existing system cannot hold the public's confidence. The government surely could not forbid speech accusing elected officials of corruption because they kow-tow to political polls or favor the interests of their home states, regardless whether such criticism caused the public to *believe* – rightly or wrongly – that elected officials were corrupt.

Furthermore, there is simply no basis for concluding that the type of GRL at issue here has any impact whatsoever on the public's perception of corruption, and hence trying to alter

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[19] The disparagement of corporate speakers as "special interests" adds nothing to the analysis beyond the unsupported assumption that such speakers have interests that are materially *narrower* than those of other speakers. And even were such an assumption true regarding corporate speakers, such narrow interests are actually a benefit in the context of Madison's remedy for factions, ensuring the diversity of groups with separate agendas that makes it difficult to form a stable majority faction.

that perception is not a reason to restrict *this* speech.[20] Indeed, if there is a perception of government corruption, it is just as likely to come from the demonization and over-regulation of political speech leading the public to see corruption where none actually exists. Further regulation would just worsen that perception, not improve it.

Finally, fostering public confidence in government for its own sake is by no means a virtue. Such confidence may be desirable for a government actually *deserving* of such esteem, but our history as a nation tends to favor the virtues of a skeptical, even critical, public as a means of keeping the government honest and limited.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

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[20] Indeed, the public perception of corruption has little to do with speech at all, and turns on numerous other factors beyond the government's control. *See* Nathaniel Persily and Kelli Lammi, *Campaign Finance After McCain-Feingold: Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 152 (2004) (concluding on the basis of extensive empirical research that, "Americans' 'confidence in the system of representative government' – specifically, their beliefs that government officials are not 'crooked' and that government is 'run for the benefit of all' – is, to a large extent, related to their position in society, their general tendency to trust others, their philosophy as to what government should do, and their ideological or philosophical disagreement with the policies of those in charge.").

Respectfully Submitted,

ERIK S. JAFFE
Counsel of record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

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Nos. 06-969 & 06-070

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION
Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC.
Appellee.

SENATOR JOHN MCCAIN, ET AL.
Appellants,

v.

WISCONSIN RIGHT TO LIFE, INC.
Appellee.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEE

Of counsel:

STEVEN J. LAW
CHIEF LEGAL OFFICER AND
GENERAL COUNSEL
U.S. CHAMBER OF COMMERCE

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
CALEB P. BURNS
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Amicus Curiae

(Additional counsel on inside cover)

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20002

ROBIN S. CONRAD
SENIOR VICE PRESIDENT
NATIONAL CHAMBER
LITIGATION CENTER, INC.

AMAR D. SARWAL
GENERAL LITIGATION
COUNSEL
NATIONAL CHAMBER
LITIGATION CENTER, INC.

JUDITH K. RICHMOND
VICE PRESIDENT AND
ASSOCIATE GENERAL COUNSEL
U.S. CHAMBER OF COMMERCE

1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

QUESTIONS PRESENTED*

The Federal Election Campaign Act ("FECA"), as amended by the "electioneering communication" provision of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), bans corporate speech on television or radio (transmitted by broadcast, cable, or satellite) that, 60 days before a general election or 30 days before a primary election, refers to a clearly identified federal candidate and can be received by 50,000 or more persons in the relevant district or state. 2 U.S.C. §§ 434(f)(3)(C), 441b(b)(2). *McConnell v. FEC*, 540 U.S. 93, 194, 205, 207 (2003), held that this provision (i) served the same compelling interest in limiting corporate candidate advocacy accepted by the Court in prior cases, (ii) provided a clear and objective bright line standard that satisfied heightened First Amendment vagueness concerns, and (iii) had not been proved to reach enough speech that was not candidate advocacy to render the definition of electioneering communication invalid on its face. However, *Wisconsin Right to Life, Inc. v. FEC*, 126 S. Ct. 1016 (2006) (per curiam) ("*WRTL I*"), held that *McConnell*'s facial ruling did not determine whether the electioneering communication ban constitutionally could be applied to particular types of speech, and remanded. The questions presented on this appeal from a judgment that the ban could not be applied to the grassroots lobbying ads at issue here are:

1. Does the First Amendment permit the electioneering communication ban to be applied to forbid corporate ads asking Wisconsin residents to petition their incumbent Sena-

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* All parties have consented to the filing of this brief *amicus curiae* as indicated by letters of consent filed with the Court. This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

tors, one of whom is seeking reelection, to oppose ongoing Senate filibustering of federal judicial nominations?

2. How can the principles that restrict application of the electioneering communication ban be formulated to provide practical and meaningful protection in the future?

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber"), founded in 1912, is the world's largest not-for-profit business federation with an underlying membership of over 3,000,000 businesses and business associations. The Chamber's members include businesses of all sizes and sectors—from large Fortune 500 companies to home-based, one-person operations. Ninety-six percent of the Chamber's underlying membership are businesses with fewer than one hundred employees. Collectively, the Chamber's members are central to our nation's economy and well-being.

Business entities are profoundly affected by federal legislation, policy, and executive action on a wide range of issues, from tort reform to taxes, intellectual property to import controls, and employment standards to environmental protection. As a result, businesses are critically interested in the formulation and implementation of federal legislation and policy and in assuring that their knowledge and concerns are fully and effectively communicated to the public, federal legislators, and other government officials. At the same time, all Americans, including American voters and government officials, have a vital interest in hearing what business corporations have to say on the key issues of the day.

Some few of the Chamber's members, particularly large corporations, maintain separate segregated funds, commonly called PACs, that permit limited direct advocacy for or against candidates. But the vast majority do not. PACs are complex and burdensome to initiate and maintain. As of July 1, 2006, there were only 1,621 PACs sponsored by corporations registered with the FEC. *See* Press Release, FEC, FEC Issues Semi-Annual Federal PAC Count (July 14, 2006), http://www.fec.gov/press/press2006/20060714paccount.html. And, only some of those PACs are sponsored by Chamber members.

When an issue arises requiring comment by a corporation that does not maintain a PAC, it often is not practical for the business to organize a PAC, solicit contributions, and then speak out in a timely fashion. Moreover, even business corporations that have PACs often will already have spent or committed their limited PAC funds to campaigns or other purposes that must receive PAC funding before the need for issue speech is discerned. Thus, business corporations have a strong interest in being able to engage in issue advocacy without the burdens and limitations of the PAC structure. And, for most, requiring them to speak through a PAC is the equivalent to banning their timely speech.

Moreover, Congress has determined that the limited sums businesses can raise and spend through the PAC process may properly be used for direct and explicit candidate advocacy. And such advocacy is a core First Amendment right. The exercise of that core right should not be impaired by requiring a corporation to divert its limited candidate advocacy funds to pay for true issue ads and grassroots petitioning that are not the functional equivalent of candidate advocacy and that the government has no compelling justification for restricting.

Public policy largely is decided by elected officials. When an active legislative issue is before incumbent officials for action, interested persons have a compelling need to address those issues and to receive speech concerning those issues. For such speech to petition effectively for redress, it must identify the government officials who will make the critical decisions. And that need does not mysteriously vanish during the lengthy blackout periods imposed by the electioneering communication ban. Yet, the electioneering communication ban, on its face, precludes much such speech.

As is discussed *infra* at 6, the Chamber joined in petitioning the FEC to conduct a rulemaking on the issues raised by this case. In addition to assisting American business thus to petition the government, the Chamber plays a key role in

advocating for the interests of its members in important matters before the courts, legislatures, and executive branches of state and federal governments. In that role, the Chamber was a party to the *McConnell* litigation challenging the facial constitutionality of the electioneering communication ban on corporate political speech that is the subject of the instant as applied challenge. The Chamber regularly files briefs *amicus curiae* where the business community's right to political speech is at stake. *See WRTL I*; *Republican Party of Minn. v. White*, 536 U.S. 765 (2002); *Elections Bd. of Wis. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721 (Wis. 1999); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). And the Chamber, which is incorporated, also has litigated to preserve its own First Amendment rights of speech and association. *See Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995).

This appeal affects the ability of the Chamber and its members to exercise their core First Amendment rights to speak to the public about active legislative issues when they are being decided and to petition for redress from incumbent elected officials who will do the deciding. Thus, the Chamber's special perspective and vital interests justify its submission of this brief *amicus curiae*.

STATEMENT OF THE CASE

The First Amendment flatly says "Congress shall make no law . . . abridging the freedom of speech . . . or the right to petition the Government for a redress of grievances." This prohibition has its fullest and most urgent application to public speech about how we govern ourselves. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). When Congress makes a law abridging such core First Amendment rights, the courts

apply strict judicial review to assure that stringent standards are met, including these:

- First, the legislation must be narrowly tailored to restrict no more core activity than is truly necessary to achieve a compelling governmental purpose. *Id.* at 41 n.48. *See also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387 (2000) (distinguishing between the compelling interest *Buckley* required for limiting expenditures and the "important interest" it accepted vis-à-vis contributions).

- Second, the legislation must provide an objective bright line that permits speakers to make confident judgments in real time as to what is permitted and to avoid chilling through uncertainty speech that the government has no compelling need to bar. *Buckley*, 424 U.S. at 43-44; *McConnell*, 540 U.S. at 126, 194 (noting that *Buckley* "marked a bright statutory line separating 'express advocacy' from 'issue advocacy'" and that *Buckley*'s vagueness problem did not arise where the statutory "components are both easily understood and objectively determinable.").

Buckley and its progeny preserved several speech-restricting provisions of FECA by construing them to apply only to speech that used explicit words such as "vote for" or "defeat" to expressly advocate the election or defeat of a clearly identified federal candidate. 424 U.S. at 44 n.52; *MCFL*, 479 U.S. at 249-50 (1986). Congress concluded, however, that the law was being circumvented by speech that lacked explicit language but still was functionally equivalent to express advocacy. So, it created a new category of restricted speech called "electioneering communications," to which it gave a detailed objective definition, i.e., corporate speech broadcast via specified media to at least 50,000 voters within 30 days before a primary or 60 days before a general election. 2 U.S.C. §§ 434(f)(3)(C), 441b(b)(2).

In *McConnell*, a bare majority of this Court declined to strike the new standard down on its face. 540 U.S. at 194, 205, 207. Vagueness was not at issue since the statute's objective criteria provided as much bright line guidance as the express advocacy test. *Id.* at 194. But because the bright line criteria easily could characterize speech that was not candidate advocacy, narrow tailoring was disputed. The *McConnell* majority found that (i) the bulk of electioneering communications would be functionally equivalent to express advocacy, and (ii) the plaintiffs had not proved the new standard would encompass enough true grassroots or issue advocacy to render it facially invalid. *Id.* at 193-94, 206-07. The Court did not explain why it required the plaintiffs to prove overbreadth rather than following settled law requiring the government to prove narrow tailoring.[1]

Following *McConnell*, Congress has continued to deal with important issues during the 90 or so days that the electioneering communication standard bans most corporate broadcasts that mention any incumbent seeking reelection.[2] For example, during the 60 days before the 2006 general election, bills involving trademark dilution (H.R. 683), voter fraud (H.R. 4844), immigration reform (H.R. 6095), port security (H.R. 4954), and a constitutional amendment to

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[1] *See Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002) (government has "the burden to prove that the [speech restriction] is (1) narrowly tailored, to serve (2) a compelling state interest . . . [by demonstrating] it does not 'unnecessarily circumscrib[e] protected expres sion'") (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222 (1989) (challenged law could "survive constitutional scrutiny only if the State shows that it . . . is narrowly tailored.").

[2] The blackout always will be at least for the 60 days before the general election. If the relevant primary or convention is 30 days or more before the general election, the total will be at least 90 days. If there is a runoff, or if a broadcast signal reaches several relevant states, the total blackout period may be considerably longer.

balance the budget (H.J. Res. 98) all were pending before or had been voted on by at least one house of Congress. Similarly, during the 60 days before the 2004 general election, the Senate and House of Representatives held a combined 157 roll call votes.[3] Indeed, it is not unusual for legislators to maneuver to set sensitive votes in the election period. *See, e.g.*, Andrew Mollison, *Votes on Guns, Marriage Slated; GOP Leaders in House Push Symbolic Bills*, Atlanta Journal-Const., Sept. 28, 2004, at 3A.[4]

In *WRTL I*, the Court noted the FEC's rulemaking power under 2 U.S.C. § 434(f)(3)(B)(iv). *WRTL I*, 126 S. Ct. at 1017. On February 16, 2006, the Chamber joined with the AFL-CIO, the National Education Association, the Alliance for Justice, and OMB Watch in petitioning the FEC to initiate a rulemaking to promulgate an exemption from the electioneering communication ban for at least some forms of grassroots lobbying. On September 5, 2006, the FEC published its decision "not to initiate a rulemaking." 71 Fed. Reg. 52295. The FEC said it preferred to await "judicial guidance," noting that the courts would have the last say on what the First Amendment demands in any event. *Id.* at 52296.[5]

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[3] *See* United States Senate and United States House of Representatives Roll Call Votes, 108th Cong.—2d Sess. (2004), http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_108_2.htm; http://clerk.house.gov/evs/2004/ROLL_400.asp; and http://clerk.house.gov/evs/2004/ROLL_500.asp (last visited Mar. 12, 2007).

[4] Thus, the systematic data collected on pages 622-26 of the Joint Appendix in *McConnell v. FEC*, 540 U.S. 93 (reproduced in the Appendix to this brief), from the 2000 election was no fluke.

[5] The Federal Election Commission's ("FEC") advisory opinion process is not a practical solution and the denial of rulemaking did not suggest it was. The Federal Election Campaign Act ("FECA") allows the agency 60 days to respond to a non-candidate inquiry. 2 U.S.C. § 437f(a). And experience shows the agency often deadlocks in close questions. *See, e.g.*, Letter from Lawrence Norton, FEC General Counsel to Cassandra

The ads of petitioner WRTL—discussed in detail in its brief and in the district court opinion—illustrate a category of core speech that the government has shown no compelling reason to suppress. This case now calls on this Court to provide a practical and effective remedy for genuine grassroots and issue advocacy that is suppressed by the lack of narrow tailoring in the electioneering communication standard.

SUMMARY OF ARGUMENT

The First Amendment squarely protects the right of corporations to petition the government for redress of grievances and otherwise to speak out on public issues. That right is vital to corporations and to members of the public who benefit from business speech and petitioning. Although this Court has accepted Congress's claim that it has a compelling need to limit some candidate advocacy by corporations, the Court has insisted that such restrictions must survive the same strict judicial scrutiny applicable to other limits on core First Amendment speech.

McConnell's surprising decision to treat the electioneering communication ban as facially valid—without requiring the government to prove it is narrowly tailored—gives heightened importance to as applied First Amendment challenges. Unless efficient and practical as applied standards are established, the electioneering communication provisions will impose a *de facto* ban on core petitioning and speech the government has no compelling need to suppress. Public discourse and policy making moves rapidly. As a practical matter, even a brief delay is as good as a ban for most

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Lentchner, Attorney for Congressman Eliot Engel (Feb. 5, 2004) http://saos.nictusa.com/aodocs/468090.pdf (noting that a 3-3 deadlock ended the FEC's consideration of the advisory opinion request). Administrative agencies, of course, are not the institutions with primary authority to construe the Constitution, which is what an as applied challenge requires.

petitioning and speech. Efforts to limit, complicate, and delay as applied review seek to eliminate as applied relief through the back door.

This Court repeatedly has employed as applied litigation to identify categories to which a facially valid standard cannot lawfully apply. *See infra* Section III. It should do so here as well.

Indeed, to provide practical benefits, this Court's as applied holding must provide a standard that is clear enough for speakers to apply for themselves in real time. If any part of a standard invites second guessing or differing opinions, the resulting uncertainty and risk will create a *de facto* lack of tailoring. To steer clear of possible civil and criminal penalties, businesses will avoid core First Amendment petitioning or issue advocacy that the government has no compelling need to suppress.

In particular, the Court should avoid formulations such as the "promote, attack, support, or oppose" standard, which invite highly subjective second-guessing. *McConnell* did not approve that formulation except as applied to political parties, whose activities presumptively are electoral, 540 U.S. at 170 n.6, and this Court should not expand that holding to ordinary corporations.

If, for some reason, the Court cannot adopt an objective bright line, it should be explicit that its as applied standard is not a substitute for the objective bright line required to survive facial analysis under *Buckley*, but operates within the primary bright line boundary drawn by the electioneering communication standard. Clarity on this point is vital because many regulators of core speech, including the FEC, resist bright lines and seize on any language of this Court that they can construe to authorize a primary standard that turns on impressionistic views of subjective factors.

The Court also should adopt a legal standard that can be applied within the four corners of the proposed ad. The brief time frame in which petitioning and issue advocacy must occur cannot be accommodated by standards that call for discovery. And the inherently imprecise and highly discretionary standards that govern preliminary injunctions should not become the norm in a regime of judicial licensing of core speech and petitioning. Instead, the controlling standards themselves should be precise, objective, and easily applied without discovery.

The facts presented by WRTL identify one common circumstance to which the electioneering communication standard does not properly apply. From time to time, elected representatives will be dealing with an active legislative issue in the 90 days prior to an election. Affected businesses must be free to address such issues freely and to urge citizens who agree to petition their incumbent elected officials for redress, even if they happen to be seeking reelection (as incumbents often do). Foreclosing such speech for 60 to 90 days or more—an eternity in public debate—is truly Draconian.[6] And permitting such true issue speech would not threaten the interest in limiting corporate electoral advocacy relied on by *McConnell*.

The Court doubtless will receive several suggestions as to how to define a category of true grassroots petitioning and issue advocacy that the government has not established a compelling need to regulate. The district court's description

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[6] The Chamber expects that WRTL and other participants will discuss why organizing and operating a PAC is a serious burden and often is entirely impractical. For corporations that do not have a PAC in place or whose PAC resources have been committed elsewhere, the electioneering communication provision will operate as a ban. In any event, this Court has held that subjecting core speech to substantial burden is a prohibited abridgment that must be justified by compelling necessity. *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986).

of the factors it considered is a useful start. Drawing on the FEC rulemaking petition that the Chamber and other groups joined in filing, the Chamber suggests this Court should protect corporate speech where:

> (i) the "clearly identified federal candidate" is an incumbent public officeholder;
>
> (ii) the communication exclusively discusses a particular current legislative or executive branch matter;
>
> (iii) the communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so;
>
> (iv) if the communication discusses the candidate's position or record on the matter, it does so only by quoting the candidate's own public statement or reciting the candidate's official action, such as a vote, on the matter;
>
> (v) the communication does not refer to an election, the candidate's candidacy, or a political party; and
>
> (vi) the communication does not refer to the candidate's character, qualifications or fitness for office.[7]

ARGUMENT

I. CORPORATE SPEECH AND PETITIONING ARE PROTECTED BY THE CORE OF THE FIRST AMENDMENT

This Court's rulings that Congress has a compelling need to regulate certain corporate speech do not suggest that

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[7] This final criterion may not be essential, but it was part of the group proposal. If the Court employs it, the Court should explain that this factor has to do with explicit and conclusive discussion and not with inferences that may be drawn from speech permitted by the preceding factors.

corporations lack full First Amendment protection.[8] To the contrary, this Court has been clear that the First Amendment fully and strongly protects petitioning and speech by business corporations. Thus, every restriction on such activity must be strictly scrutinized in light of the compelling interests alleged to make the restriction necessary.

The First Amendment right of business entities to petition is so firmly established it has its own name—the *Noerr-Pennington* doctrine. That doctrine was first formulated in cases giving the antitrust laws a narrow construction to avoid constitutional invalidity. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 509-11 (1972). But it applies more broadly to prevent a wide range of statutes from impairing the right of corporations to seek redress from the government.[9]

The right of petition includes the right to involve others in the process and collectively to address government officials. *See supra* at n.9. Thus, a business's right of petition shades into its fully protected First Amendment rights of association,

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[8] Some day the Court doubtless will wish to revisit the supposedly compelling reasons it has accepted for restricting corporate speech. The notion that using the corporate form equates to great wealth is refuted by the broad membership of the Chamber, which includes many small business corporations that work hard to achieve modest success. And the notion that federal campaign finance law should be used to protect hypothetical shareholder expectations is both highly speculative and contrary to principles of federalism. In this brief, however, the Chamber assumes the existing legal landscape.

[9] *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 934-35 (9th Cir. 2006), collects authority from this Court and the courts of appeals establishing that (i) the principle protects a broad range of corporate petitioning activity from all sorts of restraining laws, and (ii) the protection extends to speech to third parties that is reasonably ancillary to the petitioning process.

Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. at 510-11, and of free speech.

Business entities' speech on public issues is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society," *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940), and is part of "the free flow of information" the First Amendment protects, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). In case after case, this Court has held that corporate speech merits the same high level of First Amendment protection afforded to speech by individuals. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 540 (1980); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 19 (1986); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657, 699-701 (1990) (unanimous as to "strict scrutiny" standard of review); *McConnell*, 540 U.S. at 330 (Kennedy, J., dissenting) ("All parties agree strict scrutiny applies . . . .").

The First Amendment protects "speech" rather than merely speakers, and the process of meaningful speech also involves listening. Thus, the right of free speech includes the right of willing listeners to receive information from willing speakers, including business corporations. *See Bellotti*, 435 U.S. at 783 ("the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw"); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("This freedom [of speech and press] . . . necessarily protects the right to receive it.") (internal citation omitted). In particular, the First Amendment protects the right to receive political, social, and other information related to the functioning of government, *see Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (citing *Red Lion Broadcasting Co.*

v. FCC, 395 U.S. 367, 390 (1969)), including information about "candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). Without such a right, the First Amendment's universally recognized purpose of assuring free discussion of public affairs so that truth will ultimately prevail cannot be achieved. *See id.*; *Kleindienst*, 408 U.S. at 763 (citing *Red Lion Broad. Co.*, 395 U.S. at 390).[10]

In short, corporate speech on public issues receives the same high degree of First Amendment protection as speech by individuals. Although *McConnell* sustained the prohibition on corporate electioneering communications, it did so because *Buckley* had recognized "the Government has a compelling interest in regulating [corporate] advertisements that expressly advocate the election or defeat of a candidate for federal office" and electioneering communications "are the functional equivalent of express advocacy." 540 U.S. at 205-06. But that rationale implies its own limit—suppression of core speech and petitioning by business corporations must be no broader than is strictly necessary to serve the compelling interests recognized in *Buckley* and *McConnell*. Applying the electioneering communication ban to corporate petitioning and speech that is not functionally equivalent to express advocacy is unconstitutional.[11]

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[10] As this discussion demonstrates, business discussion of issues is entitled to the highest level of protection, not the lesser protection sometimes afforded to "commercial speech." But even commercial speech is highly protected. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 187-88 (1999).

[11] As noted *supra* at 1-2, the fact that Congress allows limited direct candidate advocacy via corporate PACs does not provide a rationale for limiting other core corporate speech or petitioning. First, PACs are burdensome and not established by the great majority of corporations.

II. *McCONNELL* RECOGNIZED THAT THE ELECTIONEERING COMMUNICATION STANDARD SWEEPS IN SPEECH THAT IS NOT FUNCTIONALLY EQUIVALENT TO EXPRESS ADVOCACY

Where the First Amendment's core provision is set aside to serve compelling necessity, that need must be precisely defined to mark out the limits of permissible suppression of speech. *McConnell* simply applied prior rulings finding the government had established a compelling governmental interest in limiting candidate advocacy by business corporations to protect candidate elections from corruption that threatens the link between the popular will and those who govern. 540 U.S. at 205-06 & n.88 ("unusually important interests [in] '[p]reserving the integrity of the electoral process'") (citing and quoting *Bellotti*, 435 U.S. at 788-89).

But the Court has never found a compelling need to regulate corporate petitioning or issue speech that does not advocate for or against candidates. To the contrary, it repeatedly has protected issue advocacy by business corporations. For example, *Bellotti* flatly rejected any notion that "speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation." 435 U.S. at 784. Emphasizing that First Amendment rights have "particular significance with respect to government," *id.* at 777 n.11, *Bellotti* held that the state had no compelling need to forbid corporate issue advocacy.

Similarly, *Consolidated Edison Co.* found no justification for preventing even a regulated corporate monopoly from

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Second, PACs are the only way corporations may exercise, to a limited extent, the core right of candidate advocacy. Forcing corporations to divert PAC funds to grassroots petitioning or true issue advocacy would impair core speech without any compelling necessity.

addressing "controversial issues of public policy." 447 U.S. at 537. Stressing that the corporate nature of a speaker does not undermine the "inherent worth of the speech in terms of its capacity for informing the public," it forbade the state to interfere with the corporation's use of space in its billing envelopes for issue advocacy. *Id.* at 533 (quoting *Bellotti*, 435 U.S. at 777).[12]

Similarly, the *Noerr-Pennington* line of cases protect the petitioning rights of business corporations. That right has been protected against restriction by general statutes forbidding antitrust conspiracies, unfair labor practices, and a range of other purposes. *See supra* at 11.

Buckley understood that the government's legitimate concern was limited to candidate advocacy rather than true issue speech. Thus, in crafting a narrowing construction intended to cure vagueness and overbreadth, *Buckley* focused on speech using explicit words that expressly advocated the election or defeat of clearly identified candidates. 424 U.S. at 43-44.

When Congress concluded that the express advocacy standard proved ineffective in restricting corporate candidate advocacy, Congress created and *McConnell* approved the electioneering communication standard. *McConnell* concluded that issue speech was not so rigidly protected that merely adopting the form of issue speech precluded all regulation. 540 U.S. at 193. Instead, the question was one of substance: the government was equally entitled to reach so-

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[12] The corporate form of certain nonprofit organizations is disregarded for purposes of the restrictions at issue in this case. *See* 11 C.F.R. § 114.10 (exempting *MCFL* corporations from electioneering communication ban). Like the vast majority of corporations, WRTL is not an *MCFL* organization. This case, like *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530 (1980), concerns restrictions on the speech of all corporations.

called sham issue ads that had the same function as express corporate advocacy. *Id.*

McConnell recognized the limits of its holding. In response to arguments that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications," *McConnell* responded:

> This argument fails *to the extent that the issue ads* broadcast during the 30- and 60-day periods preceding federal primary and general elections *are the functional equivalent of express advocacy*. The justifications for the regulation of express advocacy apply equally to ads aired during those periods *if the ads are intended to influence the voters' decisions and have that effect.*

Id. at 206 (emphasis added). Thus, *McConnell* did not hold that the Government had justified suppressing all electioneering communications. Instead, the need to regulate depended on whether the ads, in fact, functioned as express advocacy.

Ironically, having held that the government's need to suppress speech was determined by its substance—functioning as candidate advocacy—*McConnell* sustained an electioneering communication standard that, unlike the express advocacy standard, turned on issues of form. *Id.* Although *McConnell* concluded that the formal incidents specified by the electioneering communication standard often are markers for candidate advocacy, the Court recognized this is not always so. *Id.* at 206-07. In this significant respect the electioneering communication standard differed from the express advocacy standard—speech that uses explicit language to expressly advocate the election or defeat of a clearly identified candidate inherently will be candidate advocacy.

McConnell acknowledged that "the interests that justify the regulation of campaign speech might not apply to the regu-

lation of *genuine issue ads*." *Id.* at 206 n.88 (emphasis added).[13] In fact, the record in *McConnell* included evidence of such genuine issue speech by corporations. *See, e.g.*, *McConnell* J.A. at 328 (the Chamber supported ads "that urged Senator Daschle to schedule a Senate vote on Eugene Scalia's nomination as Solicitor of Labor"), 286 (the National Association of Manufactures ran ads supporting the President's tax proposal and "referred to the proposal as being that of the President").

Nonetheless, the Court held the electioneering communication standard was not facially void because "the vast majority" of ads within its language were the "functional equivalent" of express advocacy. *McConnell*, 540 U.S. at 206; *see also Colo. Right to Life Comm., Inc. v. Davidson*, 395 F. Supp. 2d 1001, 1020 (D. Colo. 2005) ("if the government wishes to justify a regulation of corporate political activity under [*McConnell*], it must demonstrate that the regulated activity is 'the functional equivalent of express advocacy.'"). *McConnell* did not discuss, however, whether the government had shown the statute to be narrowly tailored. Instead, it held that the plaintiffs had not proved the electioneering communication standard to be intolerably overbroad. 540 U.S. at 207. As noted above, this was a surprising departure from settled precedent placing the burden on the government to prove narrow tailoring. *See supra* at 5.

In sum, *McConnell* approved regulation of electioneering communications only to the extent they constituted the functional equivalent of express candidate advocacy. *McConnell* did not find any compelling need to suppress genuine

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[13] Context makes clear that *McConnell* uses "genuine issue ads" to distinguish speech that is the "functional equivalent" of express advocacy. To illustrate the "so-called issue advocacy" targeted by the electioneering communication standard, *McConnell* quoted an ad that accused a candidate of beating his wife and failing to support his children. 540 U.S. at 193-94 n.78.

corporate issue speech, recognized that such speech might well be suppressed by the electioneering communication ban, and held that the plaintiffs there had not proved how much such speech might exist.

III. AS APPLIED HOLDINGS OFTEN DO, AND IN THIS CASE SHOULD, ESTABLISH CATEGORICAL STANDARDS THAT MINIMIZE FUTURE LITIGATION

Public discourse moves swiftly. And while the legislative process is ponderous, the moments where grassroots petitioning may make a difference often are fleeting. Thus, there would be little benefit from a holding here that left future business speakers with nothing more than a ticket to a lengthy lawsuit.

But that need not be the result. Instead, as applied challenges regularly are used by this Court to establish standards, tests, and categories that provide meaningful future protection without litigation for entire categories of speech.

For example, *Edenfield v. Fane*, 507 U.S. 761 (1993), entertained a challenge to promotional activities by Certified Public Accountants. The Court accepted that there could be a need to protect individuals from such activities. But because businesses tend to be more sophisticated and less vulnerable, the Court held that "as applied to CPA solicitation in the business context," the statute violated the First Amendment. *Id.* at 763; *see also United States v. Edge Broad. Co.*, 509 U.S. 418, 431 (1993) (*Fane* sustained an "as applied challenge to a broad category of commercial solicitation"); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (holding an obscenity statute invalid as applied to some definitions of "lust" but not others).

Similarly, *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 620-22 (1996), held that general

spending restrictions could not be applied to "independent expenditures" by political committees. And *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), held that a restriction on honoraria violated the First Amendment as applied to federal employees in lower pay grades. There, although Justice O'Connor's partial dissent preferred to describe a different category of protected speech, she accepted the basic approach, saying:

> There is a commonsense appeal to the Government's argument that, having deemed a particular application of a statute unconstitutional, a court should not then throw up its hands and despair of delineating the area of unconstitutionality.

513 U.S. at 486.

The Court must decide how broadly the record and presentation of a particular as applied challenge allows the Court to rule. But to the extent it can, the Court should address this case in a way that provides clear and practical guidance for the future.

Such an approach is particularly important because of the nature and importance of the rights at stake. As *Buckley* recognized, core First Amendment activity is easily chilled by the threat of criminal or civil penalties. 424 U.S. at 41 n.48. That is particularly true of America's businesses, the vast majority of which take great pains to avoid even the appearance of a violation and tend to steer far wide of any possible violation. *See, e.g.*, *Office Politics: the Growing Impact of Campaign Finance and Election Law Regulations on Corporations*, Metropolitan Corp. Counsel 35 (Dec. 2005). As a result, uncertainty in the law regulating corporate petitioning and speech imposes a *de facto* ban on speech the government has no need to restrict. *See Buckley*, 424 U.S. at 41 n.48.

IV. THE WRTL ADS ILLUSTRATE A CATEGORY OF CORPORATE SPEECH TO WHICH THE ELECTIONEERING COMMUNICATION BAN CANNOT CONSTITUTIONALLY BE APPLIED

The specific circumstances presented by WRTL illustrate a category of corporate speech to which the electioneering communication standard cannot constitutionally be applied.[14] In defining that category, the Court should reject criteria that have the practical effect of defeating as applied protection for speech and petitioning.

A. That category consists of speech that merely addresses a current legislative issue and that refers to candidates only in their capacity as incumbent elected officials with responsibility for the issue being discussed.

In the FEC rulemaking petition, the Chamber and other petitioners suggested that one category of corporate speech to which the electioneering communication standard does not properly apply has the following defining characteristics: (i) the "clearly identified federal candidate" is an incumbent public officeholder; (ii) the communication exclusively discusses a particular current legislative or executive branch matter; (iii) the communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so; (iv) if the communication discusses the

[14] Of course, there is no need for the Court to identify all categories to which a standard may not be applied. The Court may proceed incrementally as particular challenges illuminate particular categories that should be protected from the general rule. However, given the First Amendment imperative to suppress no speech unnecessarily, the Court should not be unduly restrained in identifying the categories or principles that justify as applied protection.

candidate's position or record on the matter, it does so only by quoting the candidate's own public statement or reciting the candidate's official action, such as a vote, on the matter; (v) the communication does not refer to an election, the candidate's candidacy, or a political party; and (vi) the communication does not refer to the candidate's character, qualifications or fitness for office.[15]

A legislative issue is current at least when it is pending for action during the electioneering communication blackout period or is likely to be so in the near future. For example, the judicial filibuster issue addressed by the WRTL ads was active because filibustered nominations were pending in the Senate, the Senate remained in session, and Senators were actively considering potential solutions. Such a current legislative issue urgently and logically justifies discussion during the blackout period and is not mere "past history" dredged up as a pretext for candidate advocacy.

Incumbent legislators who have responsibility for acting on such an active issue are logical and necessary persons to be named in such issue discussions. By contrast, there is little need to identify a candidate who does not hold office at the time. In the case of the WRTL ads, whom else should viewers in Wisconsin petition to end judicial filibusters than their own elected Senators? Referring to elected representatives only in that role, and not as candidates or the subject of electoral exhortation, allows effective petitioning without inviting candidate campaigning.

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[15] This definition accommodates the same concerns as the district court's reference to whether the ad "exhorts the listener to do anything other than contact the candidate about the described issue," Appendix to the Jurisdictional Statement ("J.S. App.") 22a, except it makes clear the issue itself may be analyzed and that the call for action may be broader than simply contacting the candidate. For example, if the WRTL ad had said "write your newspaper, talk to your neighbors, and call your Senators to tell them . . . ," it still would have been a genuine issue ad.

Quoting a candidate's own public statements, or reciting his or her own official acts, without further commentary, can provide useful context and explain why a grassroots contact to that person makes sense. And such a presentation does not threaten the rationale of *McConnell*.

A holding that used such elements to identify true issue advocacy would be clear enough to permit substantial real time application by corporations and to permit swift adjudication if thought necessary.[16] It would not be clear enough to replace the bright line that this Court holds essential to regulating core speech, *Buckley*, 424 U.S. at 42-44. However, operating within the bright line established by the electioneering communication standard, it will mitigate that standard's lack of narrow tailoring and protect at least some core petitioning and speech Congress has no compelling need to regulate.

To a limited but vital extent, such a ruling would restore the core First Amendment right of the Chamber and other business organizations to speak out on active legislative issues of importance to the business community whenever they arise. *See supra* at 17 (regarding ads urging Senate votes on federal nominees and ads supporting the President's proposed tax plans). It also would avoid incentivising incumbent federal office holders to shield their official acts from public criticism by scheduling them during the electioneering communication blackout period.

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[16] WRTL offers a list of further criteria confirming that its proposed speech would not justify suppression. The Chamber submits that most of these factors simply are not necessary and would pointlessly circumscribe this Court's delineation of the protected category.

B. The definition should not employ standards that deny clarity or invite delay and litigation burden.

The *WRTL* district court's analysis mentioned several other considerations in concluding that the electioneering communication ban could not constitutionally be applied to the WRTL ads. If the Court deems any such elaboration necessary, it will be critical to avoid any formulation that denies clarity or invites delay and litigation burden.

1. *Subjective elements should be excluded.*

The district court explicitly and wisely declined to make protection turn on its assessment of WRTL's organizational motives or on the predicted perceptions of possible viewers of the ads. Many considerations support this outcome.

As *Buckley* discussed, speakers cannot be expected to predict with confidence how subjective factors will be judged or what predicted reactions will be attributed to their audiences. 424 U.S. at 43. In that case, the D.C. Circuit had proposed to define the statutory phrase "relative to" an election to mean speech "advocating the election or defeat of a candidate." *Id.* at 42.

Buckley held such a standard to be unconstitutionally vague because speakers could not confidently predict how their "intent" would be assessed, or what "effect" their speech might be deemed to have. *Id.* at 42-43. Such a test "puts the speaker . . . wholly at the mercy of the varied understandings of his hearers and consequently of whatever inferences may be drawn as to his intent and meaning." *Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). It "offers no security for free discussion [and] . . . blankets with uncertainty whatever may be said." *Id.* It compels the speaker to "hedge and trim," *id.*, and to "steer far wider . . . than if the

boundaries of the forbidden areas were clearly marked," *id.* at 41 n.47 (quoting and citing other authority).[17]

Motive is a particularly problematic consideration with respect to corporations or similar organizations that are controlled by and act through multiple individuals with potentially differing goals. How should subjective hopes of various corporate officers, executives, directors, and shareholders be weighed to determine the motives of a corporation? And how can a corporate decision-maker be confident that he or she knows the subjective positions of everyone involved? The fact that such a judgment is required for purposes of some laws does not alter the fact that organizational motive is difficult to assess and is a very undesirable standard for an area where bright lines are essential.

Moreover, because motives and predicted reactions are not observable, objective facts, they invite extensive discovery to find inferential proof. Many speakers would rather stand silent than accept intrusive and burdensome document production and depositions. Moreover, as already noted, the time required by such discovery often will make as applied relief illusory.

Finally, it is difficult to identify a compelling interest that turns on a speaker's subjective motivations.[18] Admittedly,

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[17] The extent to which this Court has found First Amendment considerations to demand greater precision than due process generally turns on how close the speech that may be chilled by deterrence lies to the core of the First Amendment's protections. It has been somewhat less concerned, for example, that imprecision in the definition of obscenity may chill some near obscenity, or that imprecision in defining the additional factors that convert false speech into defamation may chill some false speech that is not strictly defamatory, though even in these areas it strives for precision. In the present context, all potentially chilled speech and petitioning lies at the heart of the First Amendment and, hence, must receive maximum protection from *de facto* prohibition via uncertainty.

McConnell repeatedly referred to the "intent" of "sham" ads. But it did so to determine the likely characteristics of an entire class of activity, not as a standard to be applied to regulate specific speech. The standard that was approved was the electioneering communication standard, not an *ad hoc* assessment of motive, intent, or predicted effect. This Court should strive to provide bright line guidance.[19]

2. *The PASO standard should be avoided or objectively defined.*

The district court considered whether the ad text "promotes, attacks, supports, or opposes" the named candidate. Appendix to the Jurisdictional Statement ("J.S. App.") at 22a. Facially, this standard invites inferences about the speaker's subjective intent or likely viewer reaction. For the reasons just discussed, this PASO standard would be very troubling.

The *Brief for Amici Curiae The League of Women Voters, et. al.*, demonstrates (at 10-12) that the PASO standard has been upheld only with respect to political parties, and clearly fails the "much stricter vagueness standard" that *Buckley* demanded in other contexts. Indeed, the natural meaning of the terms involves predictions about subjective intent and predicted understanding that the district court sought to avoid.

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[18] A subjective intent element may assure that a speaker is aware of the objectionable quality of speech, and thus minimize chill. *See United States v. Cassel*, 408 F.3d 622, 631-33 (9th Cir. 2005) (discussing authorities on the role of intent); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 509-11 (1972) (holding that the sham exception to *Noerr-Pennington* protection required proof of both objective baselessness and objective bad faith). The intent element here, however, is being proposed to increase—rather than reduce—uncertainty.

[19] Bright lines are important to avoid suppression through uncertainty of speech that Congress has no compelling need to suppress. It would be a perversion to hold that Congress could suppress more speech than otherwise to provide a bright line. The ultimate objective must be to suppress no more speech and petitioning than is essential.

If the Court's goal is to define a category with sufficient clarity that most speakers can apply it for themselves in real time, and that the FEC and courts can apply swiftly and consistently when disputes arise, the PASO standard falls short for all the reasons *Buckley* explained and the *League of Women Voters* brief discusses.

Alternatively, if the Court concludes that the PASO standard or something like it is necessary, it should make clear that the standard requires an objective assessment within the four corners of the ad and does not permit speculation over what might have been intended or what might be perceived. The advocacy should be clear and certain on the face of the ad.

The Chamber also respectfully urges the Court to state expressly it is not adopting any such formula as a primary standard that could substitute for the electioneering communication or express advocacy standards. This is critical because (i) many state campaign finance statutes around the country continue to use the same vague language that *Buckley* construed to require express advocacy as well as elements of the PASO standard, e.g., La. Rev. Stat. Ann. § 18:1483(9)(a) ("'Expenditure' means . . . anything of value made for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office . . ."); (ii) already, *McConnell* has been misconstrued to hold that "holistic" approaches like PASO are sufficient when regulating political speech, e.g., *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 665 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 938 (2007); (iii) similar arguments are common in state proceedings, e.g., Brief of Respondents at 20, *Voters Education Committee v. Washington State Public Disclosure Commission*, No. 77724-1 (Wash. filed Feb. 16, 2006) (citing *McConnell* for the proposition that "the United States Supreme Court has determined that the particular terms 'support' and 'oppose' are not vague"); and even the FEC

has misconstrued *McConnell* to relax *Buckley*'s vagueness standard, e.g., Press Release, FEC, Sierra Club Agrees to Pay Civil Penalty for Violation of Federal Campaign Law (Nov. 15, 2006), http://www.fec.gov/press/press2006/2006 1115mur.html.[20]

The Chamber does not ask this Court to address these other situations. Instead, it asks the Court to make explicit the limits on any role that it may approve for a PASO type standard here.

3. *Analysis should occur within the four corners of the ad.*

The district court said it was limiting its analysis to the four corners of the ad, explaining that a broader analysis would reduce uncertainty and invite litigation delay. J.S. App. 19a-22a. More precisely, the court examined the four corners of the ad in light of information about Congressional activity that could be judicially noticed, e.g., whether judicial filibustering was an active issue.

The definition the Chamber proposes above lends itself to a similarly focused analysis, with the caveat that the court's judicial notice should not be aggressive in second-guessing the existence of an active legislative issue. If objective facts such as pending bills, statements from legislative leaders, or similar sources indicate an issue is or shortly will become active, that should suffice.

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[20] The sixth factor proposed by the Chamber above, *supra* at 20-21, is that the "communication does not refer to the candidate's character, qualifications, or fitness for office." This standard is intended to be applied strictly, and not to allow regulators to "infer" that a candidate is implicitly criticized. With the other elements in place, such a strict standard does not invite the easy circumvention of the express advocacy standard and avoids the uncertainty of a PASO standard. The Court may conclude that this sixth factor is not essential.

This four corners approach is vital for at least two reasons. First, it provides a fixed basis for self application and real time judgments. One certainty about both elections and public discourse is that circumstances change rapidly. A speaker cannot be sure that the facts existing when an ad is planned will exist when it has been produced, distributed and run. Nor can a speaker be sure what surrounding facts a regulator later may deem significant.

Second, if pre-speech litigation is thought necessary, it allows some hope that a result can be achieved within a useful time frame. From 40,000 feet it may seem like a district court should be able to target, expedite, and conclude discovery promptly, but that is not the real world. To begin with, federal courts have many conflicting demands, including criminal matters that have a constitutional claim to expedition under the Sixth Amendment's speedy trial guarantee. Moreover, the defendant typically will be the government, and for a variety of reasons, such litigation always moves slower. Some extraordinary judges may achieve speedy discovery in some exceptional cases, but core First Amendment rights should not be held hostage to the need for such extraordinary efforts unless there is no other alternative.

These difficulties cannot be avoided by placing primary reliance on temporary restraining orders or temporary injunctions. Such procedures themselves take time. Moreover, they are inherently imprecise and approximate, and vest a large quantum of discretion in the district judge. Such interlocutory procedures are a vital backstop, but they should not become a primary method for vindicating core First Amendment rights.

Importantly, in the context of the definition the Chamber has proposed, a four-corners standard does not amount to a revived express advocacy test. The limits of express advocacy were entirely avoided so long as a narrow class of words did not appear. By contrast, the other elements of the Chamber's

suggested standard allow only a few limited types of information to be included. The record contains no evidence that a four-corners approach would result in such ads being used as the functional equivalent of express advocacy.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be affirmed and the Court should hold that the electioneering communication ban cannot constitutionally be applied to corporate speech where (i) the "clearly identified federal candidate" is an incumbent public officeholder; (ii) the communication exclusively discusses a particular current legislative or executive branch matter; (iii) the communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so; (iv) if the communication discusses the candidate's position or record on the matter, it does so only by quoting the candidate's own public statement or reciting the candidate's official action, such as a vote, on the matter; (v) the communication does not refer to an election, the candidate's candidacy, or a political party; and (vi) the communication does not refer to the candidate's character, qualifications or fitness for office.

Respectfully submitted,

Of counsel:

STEVEN J. LAW
CHIEF LEGAL OFFICER AND
GENERAL COUNSEL
U.S. CHAMBER OF COMMERCE

ROBIN S. CONRAD
SENIOR VICE PRESIDENT
NATIONAL CHAMBER
LITIGATION CENTER, INC.

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
CALEB P. BURNS
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Amicus Curiae

AMAR D. SARWAL
GENERAL LITIGATION
COUNSEL
NATIONAL CHAMBER
LITIGATION CENTER, INC.

JUDITH K. RICHMOND
VICE PRESIDENT AND
ASSOCIATE GENERAL COUNSEL
U.S. CHAMBER OF COMMERCE

1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

March 23, 2007

APPENDIX

APPENDIX

106th Congress
Congressional Action During the 60 Days Prior to November Election on Bills of interest to the ACLU

Capital Punishment:

- "Sense of Congress" regarding the obligation of grantee states to ensure access to post-conviction DNA testing and competent counsel in capital cases (Amdt. 4345 to S. 3045): Introduced in the Senate on 10/26/2000.

Chruch-State: [sic]

- Bill to protect religious groups in land-use disputes (S 2869) signed by the President on 9/22/2000; P.L. 106-274.
- Allows faith-based organizations to receive federal support for programs to help low income fathers get more involved in their families' lives (HR 4678): Passed House 9/7/2000.

Criminal Justice:

- Provide grants to states to process backlog of DNA evidence (HR 4640): Passed House 10/2/2000.
- Pressure states into requiring HIV testing of rape suspects who have been formally charged, by threatening to withhold federal crime-fighting block grant money (HR 3088): Passed House 10/2/2000.
- Aimee's Law: cuts federal crime fighting money to states if convicted murderers & rapists did not serve stiff sentences and went on to commit offense in another state (part of HR 3244): Passed Senate 10/11/2000.

Gay and Lesbian Issues:

- Repeal federal charter of Boy Scouts, in reaction to Supreme Court: decision that allows Boy Scouts to discriminate against homosexuals (HR 4892): Defeated in House 9/13/2000.
- Prohibit using local or federal funds for needle exchange (amendment to HR 4942): Passed House 9/27/2000.
- Prohibit the use of Federal funds for the conduct or support of programs of HIV testing that fail to make every reasonable effort to inform the individuals of the results of the testing (HR 5615): Introduced in the House on 10/11/2000.

Hate Crimes:

- Expansion of federal hate crimes law (amendment to S 2549): House voted to instruct conferees to accept amendment 9/13/2000; conferees dropped language from bill 10/5/2000.

Immigration:

- Allow some immigrants who committed minor crimes long ago to apply to stay in US and not be deported; part of "Fix '96" (HR 5062); Passed House 9/19/2000.

Internet Filtering

- Force schools and libraries to use technology protection measures to block access by children to web pornography (amendment to HR 4577): Conferees added this provision to the bill 10/23/2000.

Media & Violence

- Require violent TV programming be limited to hours when children are not likely to be a substantial part of audience (S 876): Approved by Senate Commerce committee 9/20/2000.

Physician-Assisted Suicide:

- Overturns Oregon's law that permits physician-assisted suicide (amendment to HR 2614): Passed House 10/26/2000; Filibustered in Senate 10/27/2000.

Privacy:

- Restrictions on law enforcement use of electronic surveillance (HR 5018): Approved by House Judiciary subcommittee 9/14/2000; Mark-up by House Judiciary committee 9/20/2000.
- Creation of commission to study issue of privacy on the internet (HR 4049): Defeated in House 10/2/2000: failed to get 2/3's majority needed for passage under suspension of rules.
- Prohibit the appearance of Social Security account numbers on or through unopened mailings of checks (HR 3218): Passed House 10/18/2000; Passed Senate 10/25/2000.
- Enhance privacy protections for individuals, and to prevent fraudulent misuse of Social Security account numbers (HR 4857): House full committee mark up on 9/28/2000.

Reproductive Rights:

- Funding prohibition in DC Approp. (HR 4942; HR 5633): Passed both House and Senate on 11/14/2000.

- "Conscience clause" to employee-sponsored health plans coverage of contraceptives (amendment to HR 4942): Passed House 9/14/2000.
- Abortion restrictions on international family planning aid (HR 4811): Conference Committee appointed 10/19/2000; House debates conference report 10/25/2000;
- Define "human being;" seeks to protect humans born alive at any stage of pregnancy (HR 4292): Passed House 9/26/2000.
- Prevent abortion protestors convicted of violent crimes from seeking bankruptcy protection to avoid paying hefty legal penalties (amendment to S 3046): Senate voted to proceed with debate on 10/19/2000.
- Prohibit use of funds to distribute postcoital emergency contraception "morning after pill" on elementary or secondary school premises (HR 4577, Labor/HHS Approp.): Pre. Coburn announces intention to offer motion to instruct House conferees on this amendment on 9/18/2000.

Secret Evidence

- Makes it harder for INS to use secret evidence to deport immigrants or to deny tem [sic] asylum (HR 2121): Approved by House Judiciary Committee 9/26/2000.

Terrorism

- Provide clearer coverage over threats against former Presidents and members of their families (HR 3048): House disagreed with certain Senate amendments on 10/25/2000.

Trafficking Victims:

- Combat trafficking of persons, especially into the sex trade, slavery, and slavery-like conditions (HR 3244): Passed Senate 10/11/2000.

Violence Against Women:

- Reauthorization of VAWA (HR 1248): Passed House 9/26/2000; Passed Senate as par [sic] of HR 3244 0/11/2000 [sic].

Voting Reform

- Proposing a constitutional amendment to abolish the electoral college and to provide for the direct popular election (SJRes 56): Introduced in the Senate on 11/01/2000. Proposing a constitutional amendment to abolish the electoral college (HJRes 113): Introduced in the House on 10/12/2000.

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Nos. 06-969 and 06-970

In The Supreme Court of the United States

FEDERAL ELECTION COMMISSION, APPELLANT,
v.
WISCONSIN RIGHT TO LIFE, INC., APPELLEE.

SENATOR JOHN MCCAIN, ET AL., APPELLANTS,
v.
WISCONSIN RIGHT TO LIFE, INC., APPELLEE.

On Appeal from the United States District Court
for the District of Columbia

BRIEF *AMICUS CURIAE* OF CITIZENS UNITED, CITIZENS UNITED FOUNDATION, GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, JOYCE MEYER MINISTRIES, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, FREE SPEECH COALITION, INC., FREE SPEECH DEFENSE AND EDUCATION FUND, INC., LINCOLN INSTITUTE, PUBLIC ADVOCATE OF THE UNITED STATES, DOWNSIZEDC.ORG, AND DOWNSIZE DC FOUNDATION IN SUPPORT OF APPELLEE

MICHAEL BOOS
4101 Chain Bridge Road
Fairfax, VA 22030
(co-counsel for Citizens United & Citizens United Foundation)

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
8180 Greensboro Drive
Suite 1070
McLean, VA 22102
(703) 356-5070

Attorneys for Amici Curiae
**Counsel of Record*
March 23, 2007

(Counsel continued on inside front cover)

MARK B. WEINBERG
WEINBERG & JACOBS, LLP
11300 Rockville Pike
Suite 1200
Rockville, MD 20852
(co-counsel for Free Speech Coalition, Inc. & Free Speech Defense and Education Fund, Inc.)

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CASES
Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) 27
Buckley v. Valeo, 424 U.S. 1 (1976) ..... 3, *passim*
CBS v. Dem. Nat'l.Comm., 412 U.S. 94 (1973) 29
DeJonge v. Oregon, 299 U.S. 353, at 366 (1937) 21
Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985) 27
Eastern R.R. Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 12
Edwards v. South Carolina, 372 U.S. 229 (1963) 12, 20
FEC v. Phillips Publishing Co., 517 F. Supp. 1308 (D.D.C. 1981) 26

First National Bank v. Bellotti, 435 U.S. 765 (1978) 9
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Konigsberg v. State Bar of Calif., 366 U.S. 36 (1961) ... 17
Korematsu v. U.S., 323 U.S. 214 (1944) 16
McConnell v. Federal Election Commission, 540 U.S. 93 (2003) ..... 2, *passim*
McConnell v. Federal Election Commission, 251 F. Supp. 2d 176 (D.D.C. 2003) 14
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 6
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 27, 29
Near v. Minnesota, 283 U.S. 697 (1931) 29
New York Times v. United States, 403 U.S. 713 (1971) .. 29
Pacific Gas & Electric Co. v. Public Utilities Commission, 475 U.S. 1 (1986) 27, 28
Pennekamp v. Florida, 328 U.S. 331 (1946) 27
Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946) 8
Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004) 2
Terminiello v. Chicago, 337 U.S. 1 (1949) 7
Thomas v. Collins, 323 U.S. 516 (1945) 10, 25
United States v. Cruikshank, 92 U.S. 542 (1875) 20
Wisconsin Right to Life, Inc. v. FEC, 546 U.S. ___, 163 L.Ed.2d 990 (2006) 2, 4, 10

MISCELLANEOUS

J. Barzun, From Dawn to Decadence (Harper/Collins, N.Y.: 2000) 8
Lillian BeVier, "Campaign Finance Regulation: Less, Please," 34 *Ariz. St. L.J.* 1115 (2002) 27
W. Blackstone, Commentaries on the Laws of England (U. of Chi. Press, Facsimile. Ed.: 1769) 26, 30

Congressional Globe, 26th Congress, 1st Session (Jan. 28, 1840) 19
III Cyclopedia of Political Science, Political Economy, and the Political History of the United States, § 53 (J.J. Lalor, ed., New York: 1899) 19
FEC, Advisory Opinion 2005-16 28
FEC, Matter Under Review 2607 28
FEC, Matter Under Review 5315 28
The Federalist (G. Cary and J. McClellan, eds., Indianapolis: 2001) 19
Richard L. Hasen, "Campaign Finance Laws and the Rupert Murdoch Problem," 77 *Tex. L. Rev.* 1627 (1999) 27
G. Lawson and G. Seidman, "Downsizing the Right to Petition," 93 *Nw. U. L. Rev.* 739 (1999) 11
G. Mark, "The Vestigal Constitution: The History and Significance of the Right to Petition," 66 *Fordham L. Rev.* 2153 (1998) 11, 13, 17
Joshua L. Shapiro, "Corporate Media Power, Corruption, and the Media Exemption," 55 *Emory L.J.* 161 (2006) 27
Sources of Our Liberties (R. Perry, ed., ABA Found, Rev. Ed. 1978) 11, 12
N. Smith, "'Shall Make No Law Abridging ...' An Analysis of the Neglected, but Nearly Absolute Right of Petition," 54 *U. Cin. L. Rev.* 1153 (1986) 11, 13, 17
J. Spanbauer, "The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth," 21 *Hastings Const. L. Q.* 15 (1993) 12
J. Story, Commentaries on the Constitution (5th ed. 1891) 20

Noah Webster, An American Dictionary of the English Language (photo. reprint 1996) (First edition, 1828) 16
Webster's Third International Dictionary (Merriam & Co., Springfield, Mass.: 1964) 5

INTEREST OF AMICI CURIAE

The *amici curiae*, Citizens United ("CU"), Citizens United Foundation ("CUF"), Gun Owners of America, Inc. ("GOA"), Gun Owners Foundation ("GOF"), Joyce Meyer Ministries ("JMM"), Conservative Legal Defense and Education Fund ("CLDEF"), Free Speech Coalition, Inc. ("FSC"), Free Speech Defense and Education Fund, Inc. ("FSDEF"), The Lincoln Institute for Research and Education ("Lincoln"), Public Advocate of the United States ("PA"), DownsizeDC.org, Inc. ("DDC"), and Downsize DC Foundation ("DDCF"), are nonprofit organizations sharing a common interest in the proper construction and application of the Constitution and laws of the United States.[1] Each of the *amici* was established, *inter alia*, for education and related purposes concerning the public policy process, and are tax-exempt under Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code ("IRC").[2] For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public, on important issues of national concern, including questions related to the original text of the United States Constitution.

The First Amendment issues presented in this case directly impact the rights of individuals and organizations to express views on educational, social, political, and related topics and issues, as well as to petition and assemble, as guaranteed by the First Amendment, and are of extreme interest and importance to these *amici*. In the past, these *amici* have filed *amicus curiae*

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court.

briefs in such matters before this Court.[3]

In carrying out their respective tax-exempt missions, all of these *amici* may be directly impacted by this Court's resolution of the issues in this case. In the publication and dissemination of educational materials concerning public policy issues, it is often appropriate, if not necessary, for such materials to include the names of current legislators who happen to be candidates for reelection. According to the Federal Election Commission ("FEC"), none of these *amici* would be permitted to broadcast on television or radio any such materials during portions of a federal election cycle.[4]

SUMMARY OF ARGUMENT

Appellants' arguments rest upon the erroneous premise that Congress enacted BCRA pursuant to an alleged power to

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[3] Three of these *amici* — CU, GOA and DDC (then Real Campaign Reform.org) — were plaintiffs in the litigation that culminated in this Court's upholding challenged provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") (Pub. L. No. 107-155, 116 Stat. 81). *See* McConnell v. Federal Election Commission, 540 U.S. 93 (2003). Furthermore, two of these *amici* — CU and CUF — were *amici* before this Court in support of the successful claim of appellee Wisconsin Right to Life, Inc. ("WRTL") that McConnell did not foreclose "as applied" challenges to the constitutionality of BCRA's "electioneering communications" provisions. *See* Wisconsin Right to Life, Inc. v. FEC, 546 U.S. ___, 163 L.Ed.2d 990 (2006) ("WRTL I").

[4] Although the prohibition against electioneering communications by IRC Section 501(c)(4) organizations, such as CU, GOA, FSC, DDC, and PA, has been in force since the passage of BCRA, until recently, IRC Section 501(c)(3) organizations, such as CUF, GOF, JMM, CLDEF, FSDEF, Lincoln and DDCF were specifically exempted from the prohibition by regulation. That exemption, however, was found lacking by the district court in Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004), and subsequently repealed. *See* FEC Final Rules, 70 Fed. Reg. 75,713 (Dec. 21, 2005).

regulate the federal "political process." Instead, as this Court held in Buckley v. Valeo, and reaffirmed in McConnell v. FEC, BCRA rests upon the claim that Congress may enact campaign finance laws as a means to ensure the integrity of the "electoral process." Having failed to show that applying BCRA to WRTL's legislative-issue ads is an appropriate means to secure the integrity of a federal election, Appellants' arguments that BCRA applies even to genuine issue ads should be rejected.

Moreover, the First Amendment petition, assembly, speech, and press guarantees prohibit applying BCRA Section 203 to to WRTL's genuine issue ads. First, WRTL's right to **petition** the government for redress of grievances would be abridged because the the ads at issue target the people of Wisconsin as **constituents, not as electors,** urging them to contact their two senators to obtain specific relief on a public policy matter before them.

Second, WRTL's right of peaceable **assembly** would be abridged because BCRA Section 203 imposes upon WRTL an organizational and financial structure as a condition precedent to its sponsoring an assembly which is both **peaceful** and for a **lawful purpose**.

Third, WRTL's freedom of **speech** would be abridged by the failure of the FEC to provide adequate procedures whereby WRTL may obtain a timely and effective **judicial determination** that its ads are protected core political speech.

Fourth, WRTL's freedom of **press** would be abridged by the FEC's intrusion upon the **editorial freedom** secured to all Americans, not limited to the institutional media, as discriminatorily provided in BCRA Section 201(a).

ARGUMENT

I. THE ARGUMENTS OF APPELLANTS ARE MISGUIDED, AND SHOULD BE REJECTED

The Appellants claim that the critical issue in this case is whether the WRTL television and radio "issue ads" are "the functional equivalent" of "express advocacy" regarding the election of a candidate for federal office. *See* Brief for Appellant FEC ("FEC Br."), 18-20, 28, 32; Brief for Appellants McCain, Baldwin, Shays, and Meehan ("Interv. Br."), pp. 3-4, 14-16, 19-21. Conspicuously absent from both briefs, however, is any effort to demonstrate that the WRTL ads were "sham issue ads," functioning as "express [election] advocacy," like those found in McConnell, 540 U.S. at 206. In effect, both the FEC and the Intervenors have contended that **any** issue ad, genuine or not, broadcast during the 30-day and 60-day periods specified in BCRA Section 203 is subject to BCRA's "electioneering communication" limitations. *See* FEC Br., p. 31; Interv. Br., pp. 19-21. According to the FEC and the Intervenors, such an ad must either contain no reference to the elected official who is such a candidate or be funded by a PAC. *See* FEC Br., pp. 30-32, 35; Interv. Br., pp. 29-31. In taking this position, the FEC and the Intervenors have contended, in effect, that McConnell leaves **no** room for an as-applied challenge, an interpretation unanimously rejected by this Court. WRTL v. FEC ("WRTL I"), 546 U.S. ___, 163 L.Ed.2d 990 (2006). Moreover, their claim is based upon an erroneous reading of McConnell.

A. Congress Does Not Have Plenary Power to Protect the Integrity of the Nation's "Political Process."

The Intervenors have claimed that "[f]or a century, Congress has worked to protect the **integrity of the political process** by

regulating the use of corporate funds to influence federal elections," and that "[t]his Court reaffirmed in *McConnell* what is now well-established: that Congress has a compelling interest in preventing the 'corrosive and distorting effects' of corporate and union treasuries on the **integrity of the political process**." Interv. Br., pp. 4, 17 (emphasis added). The FEC has echoed this view, asserting that the McConnell Court deferred to Congress's definition of "electioneering communication," because of the "substantial experience of its Members as participants in the **political process**...." FEC Br., p. 30 (emphasis added). Thus, according to Appellants, BCRA's "electioneering communications" restrictions are constitutionally justified as a subset of Congress's broad power to regulate the "political process" — the process by which public policy is formulated and administered through the interaction between political leadership and public opinion.[5] But neither the Constitution nor this Court has ever countenanced such an extravagant view of plenary congressional power over the nation's political life.

In Buckley v. Valeo, this Court found congressional regulation of campaign finance to be constitutionally "appropriate" only as a means to ensure "the integrity of the **electoral process**,"[6] **not** as a means of protecting the integrity of the **political process.** Indeed, the Buckley Court stated that Congress's authority to regulate the financing of campaigns for federal office was derived from "[t]he [enumerated] constitutional power of Congress to **regulate federal elections**," as recognized by previous courts dating back to the

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[5] *See generally* the definition of "political process" in Webster's Third International Dictionary, p. 1755 (Merriam & Co., Springfield, Mass.: 1964).

[6] *See* 424 U.S. 1, 10, 25-29 (1976) (emphasis added).

early 20th century. *Id.*, 424 U.S. at 13 (emphasis added). The McConnell Court did not depart from this historical foundation; rather, it reinforced the proposition that campaign finance regulations have always been understood as a "necessary and proper" means available to Congress to protect the **electoral process** from "corruption and the appearance of corruption." *See* McConnell, 540 U.S. at 114-132. Thus, the McConnell Court concluded that "BCRA's central provisions are designed to address Congress's concerns about the increasing use of soft money and issue advertising to influence **federal elections**." *Id.*, 540 U.S. at 132 (emphasis added).

Notwithstanding this clear directive, neither the FEC nor the Intervenors have made any effort to demonstrate that application of BCRA Section 203 (2 U.S.C. § 434(f)(3)) in this case is "plainly adapted" to secure the integrity of the **federal electoral process** from corruption or the appearance of corruption. Yet, this Court always has insisted that, to justify a statute enacted pursuant to Congress's power "to make ... laws which shall be necessary and proper for carrying into execution" the federal government's enumerated powers, Congress must demonstrate not only that the end is "legitimate," but also that the means chosen to achieve that end must be "appropriate ... **plainly adapted to that end** ... **not prohibited,** but consist with **the letter and spirit** of the constitution...." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added).

B. The First Amendment Secures the Integrity of the Nation's "Political Process."

Having no regard for the role of the First Amendment to secure the integrity of the nation's political process, the FEC and the Intervenors have **unconstitutionally assumed** that the application of BCRA Section 203 to WRTL's ads is "not

prohibited," but rather "consist[s] with the letter and spirit of the constitution." Thus, the FEC and the Intervenors have placed a heavy burden upon WRTL to show that its three broadcast issue ads did **not** function as election advocacy and, therefore, are not governed by BCRA Section 203. *See* FEC Br., pp. 32-36; Interv. Br., pp. 19-21. By attempting to foist this burden upon WRTL, the FEC and the Intervenors virtually have ignored the fact that the First Amendment freedoms of speech, press, assembly, and petition were ratified as part of the United States Constitution to keep Congress's **hands off** the "political process," forbidding it to make any law "abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for redress of grievances." As this Court observed over a half century ago:

> The vitality of civil and political institutions in our society depends on free discussion.... [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people.... The right to speak freely ... is therefore one of the chief distinctions that sets us apart from totalitarian regimes.... That is why freedom of speech ... is ... protected against censorship or punishment, **unless shown likely to produce a clear and present danger of a serious substantive evil**.... There is no room under our Constitution for a more restrictive view. [Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (emphasis added).]

Having neglected to show that a failure to apply BCRA's Section 203 to WRTL's three ads would create a "clear and present danger" to the integrity of the electoral process, the FEC and the Intervenors have relegated the freedoms of speech,

press, assembly, and petition to near obscurity in their briefs. Neither brief contains quotes from, or even paraphrases, the First Amendment text, and each dispenses completely with any analysis based upon that text — notwithstanding this Court's salutary rule of construction that "every word [of the Constitution] must have its due force, and appropriate meaning...."[7] The 50-page FEC brief mentions the "First Amendment" only four times, twice invoking it in descriptive quotes from the district court opinion (FEC Br., pp. 37, 41) and twice more alluding to unnamed "First Amendment values."[8] FEC Br., pp. 27 and 41. While the 43-page Intervenors' Brief refers to the "First Amendment" six times, those references serve primarily to rehearse what this Court wrote in a prior case, rather than to apply the First Amendment's constitutional principles to this case. *See* Interv. Br., pp. 19, 21, 29, and 35. Having neglected the relevant constitutional language, the FEC and the Intervenors have failed to recognize how the application of BCRA's Section 203 to WRTL's television and radio ads violates the freedoms secured by the First Amendment.

C. McConnell and Buckley Should Be Reconsidered.

Instead of relying upon the First Amendment to secure the integrity of the political process, the Intervenors have staked their claim on a proposition gleaned from isolated passages from the McConnell and Buckley cases to support their novel proposition that "'[i]ssue ads' are entitled to no greater

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[7] *See* Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 77 (1946).

[8] As Jacques Barzun has observed: "In any context the word *values* is surely the emptiest in current use." J. Barzun, From Dawn to Decadence, p. 769 (Harper/Collins, N.Y.: 2000) (italics original).

constitutional protection than express electioneering." *See* Interv. Br., pp. 19-20; FEC Br., pp. 29-30. To the extent that McConnell and Buckley could be so construed,[9] then this Court should reconsider those cases, determining that both issue and electioneering communications are protected under the freedom of the **press**, as set forth in Part V, *infra*.

II. AS APPLIED, BCRA SECTION 203 ABRIDGES THE RIGHT OF WRTL TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES.

In its Response to Appellants' Jurisdictional-Statements, WRTL focused primarily upon its First Amendment petition claim,[10] emphasizing that the three broadcast ads at issue in this case were protected by the "right of corporations to **petition** legislative and administrative bodies," citing First National Bank v. Bellotti, 435 U.S. 765, 791 n.31 (1978). *See* Appellee's Response to Appellants' Jurisdictional Statements, p. 6 (emphasis added). The district court essentially agreed, finding that the **ads** did "not mention an election, a candidacy, or a political party, nor ... comment on a candidate's character, actions, or fitness for office, [but rather] **describe[d]** an issue that had been, and was likely to be, an **ongoing issue of legislative concern** in the Senate... **asking the listener** to contact *both* Senator **Feingold** [up for reelection] and Senator **Kohl** [not running for office] to ask **them** to oppose judicial filibusters." *See* WRTL v. FEC, 466 F. Supp. 2d 195 at 207 (D.D.C. 2006) (emphasis added).

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[9] *See, e.g.*, McConnell, 540 U.S. at 205; Buckley, 424 U.S. at 48.

[10] *See* Amended Verified Complaint for Declaratory and Injunctive Relief, ¶¶ 63 and 69, R. 30.

The FEC brief has taken issue with this finding, calling the district court's "distinction between issue advocacy and electioneering ... unrealistically sharp" and, therefore, a "critical error," claiming that there is no "clear divide between electoral advocacy and 'genuine issue advertisements.'" *See* FEC Br., p. 29. Relying on Buckley, the FEC has asserted that, because "'discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application,'" such political realities leave no room for the enforcement of any constitutional distinction. *See id.*, p. 30. But that is not what the Buckley Court concluded. Instead, citing Thomas v. Collins, 323 U.S. 516, 535 (1945) — the very passage relied upon by the district court in drawing its "sharp distinction" — the Buckley Court drew a precise line **differentiating** communications targeting the people as **electors** from those targeting people as **constituents**. *See* Buckley, 424 U.S. at 42-43. Although the McConnell Court discarded the Buckley bright-line test of "express words of advocacy," it did **not** adopt BCRA's Section 203 definition of "electioneering communications" as the new bright-line test, sweeping even "genuine issue ads" into Congress's regulatory dust pan, thereby leaving no room for an as-applied challenge. *Compare* WRTL I, 163 L.Ed.2d at 993, *with* FEC Br., pp. 30-31. Thus, as the district court ruled, by appealing to the two Wisconsin senators to act on a legislative issue before them, the WRTL ads are not the kind of ads that BCRA Section 203 may constitutionally regulate.

A. The Right to Petition Secures the Right of the People to Influence Their Elected Government Officials on Specific Policy Matters before Them.

As important as the right to influence public policy decision-making through the elective franchise has become, the right of the people to influence the formulation and implementation of

public policy did not begin at — nor is it limited to — the ballot box. Rather, the practice of petitioning governing authorities to act favorably on matters of public concern dates back to the Magna Carta,[11] and was firmly established as a right of every Englishman by the English Bill of Rights of 1689: "That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal."[12] Because the right of petition originated at a time in English history when the elective franchise was severely limited,[13] America's disenfranchised founders embraced the right of petition as the very "capstone" of the Declaration of Independence:[14]

> In every stage of these oppressions we have **petitioned for redress** in the most humble terms. Our repeated **petitions** have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be a ruler of a free people. [Declaration of Independence, reprinted in Sources at 321 (emphasis added).]

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[11] *See* The Magna Carta, ¶ 61, reprinted in Sources of Our Liberties (hereinafter "Sources") at 20-21 (R. Perry, ed., ABA Found. Rev. Ed. 1978). *See also* N. Smith, "'Shall Make No Law Abridging ...' An Analysis of the Neglected, but Nearly Absolute Right of Petition," 54 *U. Cin. L. Rev.* 1153, 1154 (1986) (hereinafter "Neglected Right of Petition").

[12] *See* Bill of Rights, "Rights of the People," ¶ 5, reprinted in Sources at 246. *See also* G. Lawson and G. Seidman, "Downsizing the Right to Petition," 93 *Nw. U. L. Rev.* 739, 747 (1999).

[13] *See* G. Mark, "The Vestigal Constitution: The History and Significance of the Right to Petition," 66 *Fordham L. Rev.* 2153, 2169, 2181 (1998) (hereinafter "Significance of Petition").

[14] *Id.* at 2191-2192.

This right of petition was affirmed as an inherent right of all of the people in several of the early state constitutions and in the first article of the federal Bill of Rights.[15] And even though the franchise has been enlarged by the 15th, 19th, 24th, and 26th Amendments, the right of petition remains unchanged, securing to the people, in their capacity as **constituents** of their elected officials, continuing access to those officials because "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *See* Eastern R.R. Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961). Further, as this Court has previously recognized, the right of petition extends to publicity campaigns — such as WRTL's grassroots lobbying in this case — that are designed to stimulate others to communicate their views on matters of public policy even though the catalytic communication, itself, is not directed to the appropriate government officials. *See id.*, 365 U.S. at 129-30, 138.

In times past, people who lacked ordinary access to their elected representatives exercised their right of petition in its "pristine and classic form," appearing at the seat of government in a direct personal appeal to those government officials who had the power to redress their grievances. *See, e.g,* Edwards v. South Carolina, 372 U.S. 229, 235 (1963). Today, grassroots lobbying campaigns such as the one launched by WRTL's television and radio ads play an even more significant role in enabling the people to communicate with their elected officials by mail, telephone, facsimile, and e-mail.

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[15] *See* Sources at 422, 426. *See also* J. Spanbauer, "The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth," 21 *Hastings Const. L. Q.* 15 (1993).

B. The WRTL Ads Are Genuine Petitions to the Government for Redress of Grievances.

Without question, each of the three WRTL ads qualifies as a First Amendment petition. First, each is a "**petition to the government**," that is, each urged the viewers or listeners as **constituents** of the two named senators to communicate to those senators in their capacity as elected governmental officials, **not** as **electors** to vote for or against either senator as a candidate for election to federal office.[16] Second, each ad urged the people to seek "**redress**," that is, specific action on an issue currently before the Senate, the very body of government that had the authority to influence the action necessary to provide the remedy sought.[17] Third, each ad concerned a "**grievance**," namely, a complaint against "a group of Senators ... using the filibuster delay tactic to block federal judicial nominees...."[18] Thus, the content of the three ads clearly satisfy the criteria by which a First Amendment petition has historically been measured. *See* Mark, "Significance of Petition," 66 *Fordham L. Rev.* at 2173-74. *See also* Smith, "Neglected Right of Petition," 54 *U. Cin. L. Rev.* at 1178-79.

The FEC and Intervenors would have this Court believe otherwise, likening the WRTL ads to an ad "exhorting viewers to 'call Jane Doe and tell her what you think.'"[19] *See* FEC Br., pp. 31, 33; Interv. Br., pp. 22-24. But WRTL's ads are a far cry from the so-called sham issue ads upon which the

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[16] *See also* WRTL v. FEC, 466 F. Supp. 2d at 3-5, 21-22.

[17] *See id.*

[18] *See id.*, 466 F. Supp. 2d at 200 n.3 and 200 n.4.

[19] *See* McConnell, 540 U.S. at 206 n.17.

"paradigmatic 'Jane Doe' ads" were based. First, such "Jane Doe" ads were found to be addressed to the people **not** as **constituents** of the elected officials in a position of governmental authority, but as **electors** of persons seeking election to public office, the three-judge district court determining that the "Jane Doe" paradigm was based upon "candidate-centered issue advertisements," not "legislative-centered" ones. *See* McConnell v. FEC, 251 F. Supp. 2d 176, 881 (D.D.C. 2003) (Leon, J., concurring).[20] In contrast, the WRTL ads were addressed **not** to Senator Feingold as a candidate, but to Senators Feingold and Kohl as sitting Senators, since the two of them, not just the one, were "the government" to which the petition was directed and in whom the power to provide the requested relief was vested.

Second, the "Jane Doe" ads did not contain specific requests for "redress" of "grievances," but rather generalized "exhortations"[21] or commendations[22] directed at both office holders and challengers. In contrast to such generalities, all three WRTL ads focused on a specific grievance, coupled with a specific call to action:

> [A] group of Senators is filibustering — blocking qualified [judicial] nominees .... Contact Senators Feingold and Kohl and tell

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[20] *See* McConnell, 251 F. Supp. 2d at 304 (Henderson, J.), 532 (Kollar-Kotelly, J.), and 875 (Leon, J.).

[21] *See* 251 F. Supp. 2d at 304 (Henderson, J.). *See, e.g.*, the Congressman Ganske ad quoted in McConnell, 251 F. Supp. 2d at 532 (Kollar-Kotelly, J.) and 876 (Leon, J.).

[22] *See* McConnell, 251 F. Supp. 2d at 304 (Henderson, J.). *See, e.g.*, the Congressman Hostettler ad quoted in McConnell, 251 F. Supp. 2d at 879 (Leon, J.).

them to oppose the filibuster. [WRTL v. FEC, 466 F. Supp. 2d at 200 n.5.]

C. WRTL's Right to Petition the Government Has Been Unconstitutionally Abridged.

Both the FEC and the Intervenors have stressed that the application of BCRA's "electioneering communication" rules to the WRTL ads does not impose a "'complete ban' on [WRTL's] speech." *See* Interv. Br., p. 29; FEC Br., p. 7. Instead, the FEC has claimed that application of BCRA Section 203 to the WRTL ads "imposes relatively minor burdens,"[23] while the Intervenors see no "undue burden," because BCRA affords WRTL "ample alternative means to disseminate its message" (*see* Interv. Br., p. 15), namely, paying for the ads out of segregated funds,[24] or restructuring itself as an "MCFL-type" organization,[25] or using media other than television or radio,[26] or omitting any reference "clearly identifying" Senator Feingold.[27] Thus, the FEC has contended that WRTL would "suffer no substantial impairment of its ability to engage in issue advocacy,"[28] and the Intervenors have claimed that the "burden" placed by BCRA Section 203 on WRTL's "First Amendment rights" is "tolerable in view of the compelling governmental interest at stake." *See* Interv. Br., p. 29.

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[23] *See* FEC Br., p. 35.

[24] *See* FEC Br., p. 36; Interv. Br., pp. 29-30.

[25] *See* FEC Br., p. 36, n.9; Interv. Br., pp. 29-30.

[26] *See* FEC Br., pp. 6 n.2, 36; Interv. Br., p. 31 n.20.

[27] *See* FEC Br., p. 36; Interv. Br., p. 20.

[28] *See* FEC Br., pp. 35-36.

Not once has the FEC or the Intervenors claimed, however, that the burden imposed by BCRA Section 203 did not "abridg[e]" WRTL's petition rights. Yet, that is the ultimate **legal** issue in this case. The First Amendment does not secure the freedoms of speech, press, assembly, and petition against "complete bans," or "substantial impairments" or "undue burdens," no matter how "tolerable." Rather, the First Amendment prohibits "Congress from making any law **abridging"** those freedoms. At the time the First Amendment was ratified, the word "abridging" meant "shortening" or "lessening," as well as "depriving" or "debarring."[29] And while "depriving" and "debarring" connoted a "taking away," both terms also meant "hindering from enjoying." In short, the word "abridging" would appear to prohibit any "burden" upon the exercise of one of the specified rights, without regard to whether it was "undue," or "substantial," much less a "complete ban." Thus, the FEC's contention that BCRA's Section 203 has placed only "minor burdens on corporate speakers" or did not "substantial[ly] impair[] its ability to engage in issue advocacy"[30] should be disregarded as irrelevant, unsupported by the text.

Equally insupportable in light of the plain meaning of "abridging" is the Intervenors' assertion that if Congress has a "compelling" enough reason, then it may "burden" one or more of the named freedoms. *See* Interv. Br., p. 29.[31] Rather, as

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[29] *See* Noah Webster, An American Dictionary of the English Language (photo. reprint 1996) (First edition, 1828).

[30] *See* FEC Br., pp. 35-36.

[31] Intervenors' argument here is reminiscent of the wartime rationale found in Korematsu v. U.S., 323 U.S. 214, 216 (1944), that "pressing public necessity" justified the wholesale segregation of Japanese-Americans because it was "impossible to bring about an immediate segregation of the

Justice Hugo Black once observed :

> [T]he First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in the field. [I]t cannot be denied that the very object of adopting the First Amendment ... was to put the freedoms protected there completely out of the area of any congressional control. [Konigsberg v. State Bar of Calif., 366 U.S. 36, 61, 68 (1961) (Black, J., dissenting)].

Hence, he concluded, the right "to think, speak, or publish ... cannot be taken away if the Government finds it sufficiently imperative ... to do so." *Id.* at 68.

While the right to petition the government for redress of grievances is closely related to the freedoms of speech, press and assembly, it secures a right that is distinct from the other three and, as affirmed by the English Bill of Rights, absolutely protected against **any government-imposed impediments** upon its exercise. *See* Smith, "Neglected Right of Petition," 54 *U. Cin. L. Rev.* at 1180. Indeed, because the very nature of a First Amendment petition is addressed to the government, any effort by the government to limit that right is not only suspect as self-serving, but violative of the principle of "reciprocal duties" between the people and their elected officials — the petitioners, by the petition itself, having acknowledged the legitimacy of the government, in exchange for their officials' "listening" to the complaints of their constituents. *See* Mark,

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loyal from the disloyal...."

"Significance of Petition," 66 *Fordham L. Rev.* at 2169-70.

Clearly, BCRA Section 203 impedes WRTL's efforts to petition the government. First, it **prescribes** the medium by which WRTL may submit its request, having exempted the "non-broadcast" media, such as "billboards, newspaper and magazine advertisements, brochures, handbills, ... the telephone and the Internet,"[32] thereby depriving WRTL of access to the most powerful means by which it may reach the constituents who are in a position to influence the government action that it seeks. Second, it **prevents** WRTL from identifying one of the two government officials who are in a position to redress WRTL's grievance, requiring the ads to be addressed either to one Senator only or, if to both, identifying Senator Feingold as the unknown Senator.[33] Third, it **dictates** how the citizens who met to form WRTL are permitted to organize and finance their efforts if they wish to participate fully in the give-and-take process by which public policy decisions are made, requiring it to participate in the on-going process of government in the same way as it would be permitted to participate in the electoral process alone.[34]

Efforts by Congress to impede input from citizens are not new. In 1840, the U.S. House of Representatives adopted its notorious Rule XXI, banning abolitionist or anti-slavery petitions from being received or entertained. *See*

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[32] *See* FEC Br., p. 6 n.2; Interv. Br., p. 31 n.20.

[33] *See* Interv. Br., p. 31. While the Intervenors now appear to concede that the ads could be addressed to both senators, so long as Senator Feingold is not named, their proposed textual compromise would not appear to satisfy the FEC's position that the ad would be permissible only if it "omitted any reference to Senator Feingold." *See* FEC Br., p. 36.

[34] FEC Br., p. 36; *see* Interv. Br., pp. 29-31.

Congressional Globe, 26th Congress, 1st Session (Jan. 28, 1840). Spearheaded by the efforts of Congressman John Quincy Adams, this rule was abolished on December 3, 1844, in recognition of the reciprocal duty imposed upon the House by the petition guarantee. *See* III Cyclopedia of Political Science, Political Economy, and the Political History of the United States, § 53 (J.J. Lalor, ed., New York: 1899).

Certainly Adams's success in restoring the operative principle of "reciprocal duty" to the popular petition process in the House constituted a signal victory that government officials do not stand *in loco parentis* over the people who put them there. However, that principle now again is in jeopardy, put at risk by Congressional Intervenors who chafe under the limitations on their power imposed by the First Amendment, and also threatened by the instrumentality that they created to regulate the political process by which they may be challenged for reelection. By this point in American history, it would be naive indeed to assume that those who write the laws are not tempted to tailor the rules of politics so as to minimize unwanted criticism from a well-organized and funded citizenry. Indeed, the threat has become so great that it may well be that the principal concern regarding corruption in government is that which would inevitably follow Congress being given free reign to regulate and even criminalize constitutionally-permitted participation in the political process. After popular election, Members of Congress have a continuing duty at least to tolerate any lawful input from their constituents and the people by organizational and financial means not regulated by Congress. Properly applied in this case, the petition guarantee serves as an "external control" to guard against "the abuses of government," in recognition of the fact, as James Madison reminded us, that men are not "angels." *See Federalist 51* reprinted in The Federalist, p. 269 (G. Cary and J. McClellan, eds., Indianapolis: 2001).

III. AS APPLIED, BCRA SECTION 203 ABRIDGES THE RIGHT OF WRTL PEACEABLY TO ASSEMBLE.

Historically, the right of the people to petition the government for redress of grievances has been linked to the right of the people to assemble. *See* 2 J. Story, Commentaries on the Constitution Section 1893 (5th ed. 1891). After all, the right to petition was usually exercised by a personal gathering of people, physically assembled to submit the petition to the government official(s) with authority to provide the requested redress. *See* Edwards v. South Carolina, 372 U. S. at 235. And, as Justice Story observed, the right of assembly when coupled with the right of petition "results from the very nature of [a republican government's] structure and institutions." J. Story, Commentaries on the Constitution at Section 1894.

As long as an assemblage is conducted in an orderly and peaceful way, and as long as it promotes lawful change of government policy — such as was the case involving the WRTL ads — there is no constitutional justification for interference with such an assemblage for the "very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *See* United States v. Cruikshank, 92 U.S. 542, 552 (1875).

Neither the FEC nor the Intervenors have claimed that the WRTL ads threatened a breach of the peace or called for anything but peaceable political action. Yet, according to their "constitutional" perspective, Congress may authorize imposition of serious civil penalties — or in the case of an allegedly knowing and willful violation, even criminal fines and imprisonment — against any person or entity that would broadcast an ad such as WRTL's during the forbidden 30-day

and 60-day election periods. *See generally* 2 U.S.C. § 437g. In essence, the FEC and the Intervenors would brand organizations like WRTL as political outlaws, ineligible to participate fully in the process by which public policy is formulated and implemented.

The only justification provided by the FEC and the Intervenors to thwart WRTL's ads is the claim that the ads **really** intended to influence, and will have the effect, of influencing the 2004 Wisconsin election. *See* FEC Br., pp. 43-49; Interv. Br., pp. 21-28. But **neither** claims that such influence would **corrupt** or have the **appearance of corrupting** that election. Instead, both assumed that, if the election were influenced, necessarily it would be corrupted, or at least give the appearance of corruption, because the ads were paid for, in part, by monies drawn from the general treasuries of some unnamed business corporations.

According to the FEC and the Intervenors, the WRTL ads could have been broadcast under different auspices, *i.e.*, by WRTL's PAC or by a WRTL restructured as a "MCFL-type" organization. *See* FEC Br. 36, and n. 9; Interv. Br., pp. 29-31. However, the Intervenors' and the FEC's effort here to disqualify WRTL from full participation in the political process because its ads were funded, in part, by monies drawn from the general treasuries of business corporations is reminiscent of past unconstitutional efforts, such as that to prohibit the Communist Party — an organization dedicated to the violent overthrow of the government — from sponsoring a peaceful assembly called "to discuss the public issues of the day ... in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances"[35]:

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[35] DeJonge v. Oregon, 299 U.S. 353, at 366 (1937).

> The question, if the right[] of ... peaceable assembly [is] to be preserved is **not as to the auspices** under which the meeting is held, **but as to its purpose**.... [*Id.* at 365 (emphasis added).]

There is no question that, objectively, the purpose of the WRTL ads, as found by the district court, was a lawful one, namely, to seek legislative action to end the judicial filibuster issue then before the Senate of the United States,[36] **not** to corrupt the electoral process as a conduit for the "funneling [of] unregulated monies to an advocacy group to pay for ads that will influence a federal election," as the Intervenors have erroneously presumed. *See* Interv. Br., p. 30.

IV. AS APPLIED, BCRA SECTION 203 ABRIDGES WRTL'S FREEDOM OF SPEECH.

The FEC and the Intervenors have asserted that, while the WRTL ads on their face may appear to be issue advocacy — presumably protected by the freedom of speech — if read in context, subjectively they are electoral advocacy, outside First Amendment protection. *See* FEC Br., 19-20, 36-48; Interv. Br., pp. 15-16, 21-28. Thus, the FEC and Intervenors have faulted the district court for failure to inquire into the factual milieu surrounding the broadcast of the ads, with special emphasis upon WRTL's PAC activities opposing the reelection of Senator Feingold and documenting Senator Feingold's support of judicial filibusters. *See* FEC Br., pp. 8-11, 19-20, 40-43; Interv. Br., pp. 2-3, 9-11, 13-14, 15-16, 21-28. However, the FEC has failed to put in place the constitutionally-required free speech procedures by which one might obtain review of a

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[36] *See* WRTL v. FEC, 466 F. Supp. 2d at 207-208.

proposed issue ad in a timely way, thereby ensuring that an issue ad that was not intended to influence an election, nor have such an effect, could be broadcast during the 30-day or 60-day periods governed by BCRA's Section 203.

Forty-two years ago, in Freedman v. Maryland, 380 U.S. 51 (1965), this Court faced a similar problem in the enforcement of a Maryland motion picture obscenity censorship statute. Prior to Freedman, this Court had rejected a **facial** challenge to "a requirement of submission of motion pictures in advance of exhibition," similar to the requirement in the Maryland statute." *Id.*, 380 U.S. at 53. In Freedman, however, the Court rejected the claim that the prior facial ruling provided the standard by which to measure the constitutionality of the Maryland statute, as applied. Rather, the Court turned its attention to the "procedure for an initial decision by the censorship board" to ascertain whether that procedure "presents a danger of unduly suppressing protected expression." *Id.*, 380 U.S. at 54. After finding that the statute failed (a) to "put[] the [initial] burden of proving that the film is unprotected expression ... on the censor" and (b) to ensure a prompt "judicial determination in an adversary proceeding [which alone] ensures the necessary sensitivity to freedom of expression,"[37] the Freedman Court concluded that "the Maryland apparatus of censorship ... operates in a statutory context in which **judicial review** may be too little and too late," because, in effect, it conferred upon the censorship board "**excessive administrative discretion**." *Id.*, 380 U.S. at 57 (emphasis added).

In like manner here, the procedure available to WRTL to obtain review of its proposed ads before the 30-day and 60-day periods expired would have been "too little and too late." As

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[37] *Id.*, 380 U.S. at 58.

the district court found, "it is entirely unreasonable, if not fanciful, to expect that [WRTL] could have obtained complete judicial review of its claims in time for it to air its ads during the 30 and 60-day periods leading up to federal primary and general elections ... in 2004," even "pursuant to BCRA section 403(a)(4) [which] expedited the disposition of this matter 'to the greatest possible extent....'" WRTL v. FEC, 466 F. Supp. 2d at 202. Even if WRTL had sought an advisory opinion from the FEC, as provided in 2 U.S.C. Section 437f(a)(1), it would have faced a 60-day period before the FEC would be obligated to render such an opinion and, if adverse or indecisive, WRTL would then have the burden of having to file for judicial review under BCRA Section 403(a)(4).[38] Thus, as was the case in Freedman v. Maryland, BCRA "lacks sufficient safeguards for confining [FEC's] action to **judicially determined constitutional limits.**" *See id.*, 380 U.S. at 57 (emphasis added). Without such safeguards in place, the FEC's and

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[38] CU, one of the *amici* which produces and distributes documentary films as an important part of its educational activities, has already experienced such a deprivation of its First Amendment rights. With respect to the broadcast of such a film produced in 2004 — *Celsius 41.11* — CU sought from the FEC recognition that the film (and advertising therefor), although mentioning candidates for federal office, were not electioneering communications because of the media exemption set forth in 11 C.F.R. § 100.29(c)(2). In Advisory Opinion ("AO") 2004-30 (Sept. 10, 2004), however, the FEC denied the exemption for the CU film on the grounds that the broadcasts would meet all of the definitional elements of an "electioneering communication" and CU "does not regularly produce documentaries or pay to broadcast them on television." *Id.* It would have been virtually impossible to obtain a judicial review of that determination within the next few weeks. As a consequence, CU was prohibited from broadcasting either the film or advertising for the film in the weeks preceding the 2004 presidential election with footage of President George W. Bush and Senator John F. Kerry. Both CU and CUF have produced a number of award-winning documentary films since that time, and other films — some of which mention current as well as potential candidates for federal office — are currently in production.

Intervenors' insistence upon a thorough contextual inquiry into the intent and effect of WRTL's ads would result in greater constitutional protection being provided to the purveyors of pornography than that available to the people engaged in core political speech.

V. AS APPLIED, BCRA SECTION 203 ABRIDGES WRTL'S FREEDOM OF THE PRESS.

Additionally, BCRA Section 203 runs afoul of WRTL's rights under the freedom of the press. While WRTL did not explicitly refer to the press freedom in its complaint, the district court resolved WRTL's claim according to "decades of First Amendment jurisprudence,"[39] relying heavily upon Thomas v. Collins, which stated:

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights.... [*Id.*, 323 U.S. at 530.]

Thus, the freedom of the press, as well as the freedoms of speech, assembly and petition, is properly before this Court.[40]

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[39] *See* WRTL II, 466 F. Supp. 2d at 207.

[40] In McConnell, one group of the party plaintiffs (which included three of the *amici* filing this brief) relied expressly upon the freedom of the press in its facial challenge to BCRA Section 203. *See, e.g.*, Brief for Appellants Congressman Ron Paul, *et al.*, No. 02-1747 (S.Ct.), July 8, 2003, pp. 13-16. Unfortunately, this claim was overwhelmed by the "overbreadth" claim raised by the other parties, lost in the shuffle, not analyzed and summarily dismissed in a footnote which did not even identify the party which had

Although frequently overlooked in campaign finance litigation,[41] the freedom of the press was recognized by Congress to apply to the electoral process in the Federal Election Campaign Act of 1971, as amended ("FECA"), having exempted virtually all funds spent by the institutional media[42] in relation to federal elections from FECA coverage.[43] In BCRA, Congress used similar language to exempt the institutional media from its definition of "electioneering communication," excluding: "(i) a communication appearing in a **news story, commentary, or editorial** distributed through the facilities of any broadcasting station, **unless** such facilities are owned or controlled by any political party, political committee, or candidate...." BCRA Section 201(a); 2 U.S.C. § 434(f)(3)(B)(i) (emphasis added).[44]

Because the WRTL ads were neither broadcast as a news story, commentary, or editorial nor distributed through the facilities of any broadcasting station, they were not protected by this exemption. But the constitutional press freedom is not limited to the institutional press. Rather, it is a right belonging

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raised the issue, stating only that the issue "lacks merit." 540 U.S. 93, 209 n.89. However, this as-applied challenge demonstrates the continuing relevance of the press right in relation to the enforcement of campaign finance law.

[41] For example, freedom of the press is referenced only twice in Buckley v. Valeo, 424 U.S. at 92, 127 n.93.

[42] *See* FEC v. Phillips Publishing Co., 517 F. Supp. 1308, 1312 (D.D.C. 1981).

[43] *See* 2 U.S.C. § 431(9)(B)(i) and 11 C.F.R. §§ 100.73 and 100.132.

[44] *See also* 11 C.F.R. § 100.29(c).

to all of the people,[45] and Congress is wholly without power to discriminate in favor of that segment of the press which has the most effective lobbyists and lawyers to ensure its protection.[46] As Justice Frankfurter observed in Pennekamp v. Florida, 328 U.S. 331, 364 (1946) that "[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. '...the liberty of the press is no greater and no less ...' than the liberty of every citizen of the Republic."[47] *Id.* at 802. Thus, outside the area of campaign finance, this Court has refused to differentiate between media and nonmedia defendants.[48] Indeed, in Pacific Gas & Electric Co. v. Public

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[45] *See* IV W. Blackstone, Commentaries on the Laws of England, pp. 151-52 (U. of Chi. Press, Facsimile. Ed.: 1769) ("**Every freeman** has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press.") (emphasis added).

[46] It has been suggested that the reason the institutional press generally supports campaign finance reform is that this would give them a speech and press advantage over other communicators. *See* Joshua L. Shapiro, *Corporate Media Power, Corruption, and the Media Exemption*, 55 Emory L.J. 161 n.22 (2006); Lillian BeVier, *Campaign Finance Regulation: Less, Please*, 34 Ariz. St. L.J. 1115 (2002); *see generally* Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 Tex. L. Rev. 1627, 1664 ("There is no surer way to turn the press against campaign finance reform than to subject the press to new restrictions.").

[47] *See also* Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 at 691 (1990) (Scalia, J., dissenting) ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.").

[48] *See* Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985). "Wisely, in my view, Justice Powell does not rest his application of a different rule here on a distinction drawn between media and nonmedia defendants." *Id.* at 773 (White, J., concurring). *See also id.* at 783-84 (Brennan, J., dissenting).

Utilities Commission, 475 U.S. 1 (1986), the Court applied to a public utility company the freedom of the press principles it had earlier applied to a newspaper in Miami Herald Publishing Co. v. Tornillo (418 U.S. 241 (1974)).[49]

Even the FEC itself has applied the statutory press exemption beyond the institutional press. In Matter Under Review ("MUR") 2607, the FEC determined that an in-flight magazine distributed by Northwest Airlines, Inc. should be dismissed due to the press exemption, even though it was not part of the institutional press. Similarly, in MUR 5315, the FEC decided to take no action against Wal-Mart Stores, Inc. for publishing a magazine which appeared to reproduce certain portions of the campaign literature of a candidate for the U.S. Senate. At that time, three of the six commissioners issued a Statement of Reasons which took the view that "the press exemption should be broadly construed to insulate the content of publications (and editorial judgment of publishers) from regulation." Statement of Reasons for MUR 5315, p. 5 (Aug. 25, 2003). Also, in AO 2005-16, the FEC applied a two-step test to determine that the press exemption covered websites owned by a corporation which disseminated stories, commentary, or editorials, even if it evidenced "a lack of objectivity" or even if it "expressly advocates the election or defeat of a clearly identified candidate for federal office." AO 2005-16, p. 6.

Only if the freedom of the press were merely a discretionary matter of legislative grace would the FEC have the latitude to confer it solely upon the institutional press while regulating all other publications. And, as Justice Thomas pointed out in his

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[49] "The concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to appellant [a public utility corporation] as well as to the institutional press." Pacific Gas & Electric, *supra*, 475 U.S. 1, 11.

McConnell dissent, if the current press exemption in the nation's campaign finance law is not rooted in freedom of the press, but rather based solely upon the wisdom and experience of Congress, then even the institutional press exemption may be in jeopardy:

> Media companies can run procandidate editorials as easily as nonmedia corporations can pay for advertisements. Candidates can be just as grateful to media companies as they can be to corporations and unions.... Media corporations are influential. There is little doubt that the editorials and commentaries they run can affect elections. [McConnell, 540 U.S. at 283-84 (Thomas, J., dissenting).]

Under the current press exemption, the FEC could not dictate to a radio or television station the content of its editorials or commentaries on the ground that they were intended to influence, and had the effect of influencing, an election.[50] Indeed, such an interference with the station's editorial judgment would violate the freedom of the press, because this Court has insisted that the freedom of the press protects the "editorial function" of the publisher or disseminator from government censorship, whether the power to censor be exercised to edit out,[51] or to edit in.[52] Additionally, the autonomy of editorial control is also violated by a

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[50] *See* CBS v. Dem. Nat'l.Comm., 412 U.S. 94, 148-70 (1973) (Douglas, J., concurring).

[51] *See* Near v. Minnesota, 283 U.S. 697, 712-14 (1931); New York Times v. United States, 403 U.S. 713, 717-19, 723-25, 733 (1971).

[52] *See* Miami Herald v. Tornillo, 418 U.S. at 241, 247-54, 256, 258 (1974).

regulation which impairs the financial ability of a person to exercise editorial control. *See* Miami Herald, 418 U.S. at 255-58. The electioneering communication provisions of BCRA as applied to WRTL violate WRTL's editorial control over the message it wants to communicate, by limiting the use of a candidate's name and by imposing financial conditions upon its right as a "freeman ... to lay **what sentiments he pleases** before the public." *See* IV Blackstone's Commentaries, p. 151 (emphasis added).

Although the consequence of properly applying freedom of the press beyond the institutional press to every "freeman" would profoundly affect the area of campaign finance,[53] it would do no more than require the Congress to live within its constitutional limitations while allowing the restoration of the unfettered liberty of the people to participate in both choosing and then influencing their elected officials.

CONCLUSION

For the reasons stated in Parts I A. and B., and II through IV, the ruling of the district court should be affirmed. For the reasons stated in Parts I C. and V., McConnell and Buckley should be reconsidered, and the ruling of the district court should be affirmed on grounds that BCRA Section 203 violates WRTL's freedom of the press.

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[53] Federal election law has long been employed to protect incumbents by granting candidates an exclusive "trademark" on the use of their name by prohibiting an entity other than a candidate's authorized committees to use a candidate's name. 2 U.S.C. § 432(e)(A)(4). Therefore, today it is illegal for citizens to organize themselves politically under a name which clearly communicates their purpose to defeat an incumbent, such as "Citizens Against John Smith," even "Citizens For Jane Doe" being prohibited.

Respectfully Submitted,

MICHAEL BOOS
4101 Chain Bridge Road
Suite 313
Fairfax, VA 22030
(co-counsel Citizens United & Citizens United Found.)

MARK B. WEINBERG
WEINBERG & JACOBS, LLP
11300 Rockville Pike
Suite 1200
Rockville, MD 20852
(co-counsel Free Speech Coalition & Free Speech Defense & Education Fund)

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
8180 Greensboro Drive
Suite 1070
McLean, VA 22102
(703) 356-5070

Attorneys for Amici Curiae
**Counsel of Record*

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In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC.,
Appellee.

SENATOR JOHN MCCAIN, ET AL.,
Intervenor-Appellants,

v.

WISCONSIN RIGHT TO LIFE, INC.,
Appellee.

ON APPEALS
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF A COALITION OF PUBLIC CHARITIES, AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

ROBERT F. BAUER
Counsel of Record
KARL J. SANDSTROM
EZRA W. REESE
PERKINS COIE LLP
607 Fourteenth Street, N.W.
Washington, D.C. 20005
(202) 628-6600

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF THE *AMICI CURIAE*

Amici[1] are public charities, tax-exempt under section 501(c)(3) of the Internal Revenue Code. Individual organizations' Statements of Interest are presented below.

A. OMB Watch

OMB Watch is the operating name of Focus Project, Inc., a nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code. Its goal is to promote government accountability and citizen participation in public issues. It is guided by the belief that improving access to governmental decision-makers and energizing citizen participation will lead to a more just, equitable and accountable government, and a stronger society.

OMB Watch's primary focus areas are the federal budget; nonprofit advocacy; government transparency and accountability; and legislation and regulations impacting economic justice, health, safety, and the environment. OMB Watch has a 17-person staff and a $1.7 million annual budget. On this modest budget it has had a significant impact. Over the years, it has played a leadership role on important federal policies, including regulatory reform measures, balanced budget constitutional amendments, and the estate tax. Roughly

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[1] This brief is filed with the consent of all parties, as indicated by letters of consent filed with the Court. No counsel for a party authored this brief, in whole or in part. No person or entity other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ninety percent of its revenue comes from foundations, often in the form of project grants.

In order to be effective, OMB Watch must react quickly and flexibly to emerging policy debates. Changing congressional goals require it to shift from planned agenda items to unplanned ones. It often works through coalitions, and it places a high value on bridging the gap between Washington and the grassroots level, and energizing citizens at the community level. The coalitions OMB Watch leads connect it to scores of umbrella groups and national membership associations. They, in turn, distribute OMB Watch's materials to thousands of their respective constituents around the country.

When choosing how it will communicate, OMB Watch along with its coalition partners must select means of communication that are suitable to the task. For example, if the House of Representatives or the Senate unexpectedly schedules a vote of importance, time does not always allow for a direct mail or telephone campaign. Broadcast advertising may be the only way to influence the debate.

OMB Watch and its coalition partners of nonprofit organizations take advantage of free and paid media efforts to spread their messages. If they cannot afford to pay for television or radio advertisements, they rely on the broadcasters' willingness to provide unpaid access. Access is provided consistent with the broadcasters' legal obligation to operate in the public interest. OMB Watch and its coalition partners also hold press conferences or other informational events, some of which are covered by C-SPAN or local public interest channels.

As a public charity, OMB Watch does not and cannot use these occasions to intervene in political campaigns.

Nevertheless, in the course of a typical broadcast there will be regular references to clearly identified officeholders who may also be candidates for federal office. Indeed, it is impossible for OMB Watch to avoid referring to federal candidates, given that the key decision-makers on the issues it seeks to affect are almost always qualified as candidates under federal campaign finance law. Almost invariably, the sponsor of the legislation discussed or the executive who has initiated the policy debate is also a federal candidate.

Because OMB Watch is a public charity, it does not have the option of speaking through an affiliated political committee. As a result, due to the electioneering communication restrictions, it has only two choices: stay silent or risk prosecution.

B. Independent Sector

Independent Sector ("IS"), a nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code, is the leadership forum for charities, foundations, and corporate giving programs committed to advancing the common good in America and around the world. Its nonpartisan coalition leads, strengthens, and mobilizes the charitable community in order to fulfill its vision of a just and inclusive society of active citizens, vibrant communities, effective institutions, and healthy democracy. Independent Sector's membership of 575 organizations collectively represents tens of thousands of charitable groups serving every cause in every region of the country, as well as millions of donors and volunteers.

IS serves as the premier meeting ground for the leaders of America's charitable and philanthropic sector. Since its founding in 1980, IS has sponsored ground-breaking

research; fought for public policies that support a dynamic, independent sector; and created resources so staff, boards, and volunteers can improve their organizations and better serve their communities. IS fulfills its mission by convening sector leaders to work together on key issues; promoting policies that enable the charitable community to engage with public officials on a nonpartisan basis; supporting the development and dissemination of strategies to strengthen volunteering, voting, giving, and other forms of citizen engagement; encouraging the sector to meet the highest standards of ethical practice and effectiveness; and serving as the voice of the charitable community to the media, government, business, and international voluntary communities.

IS is currently engaged in a broad range of public policy issues ranging from federal and state regulation of charitable organizations, federal tax and spending policies, federal tax incentives for charitable giving, and protecting the advocacy rights of nonprofit organizations. The majority of its members are 501(c)(3) organizations that may not participate in, or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office, but these organizations frequently engage in advocacy efforts to inform public policy debates on issues that affect their constituents' and their ability to fulfill their charitable purposes.

These advocacy efforts at times include communications with elected officials in their current capacity as representatives of the people, whether or not they are, at the same time, candidates for federal office. Organizations cannot predict or control the timing of when an issue will be considered by public officials. Some of IS's member organizations, for example, are concerned about the possibility of estate tax repeal because of the

negative effect that would have on charitable giving. Their ability to encourage the public to contact their elected officials about a pending vote on the estate tax would be curtailed if the vote was scheduled during an election period. IS members may find it necessary to run ads asking a local official to keep a particular shelter open, even though the official is also a candidate for federal office. IS members have called on the public to contact their congressional representatives about pending votes that affect the funding and eligibility requirements for specific government programs related to charitable purposes ranging from human services to health to the arts.[2]

SUMMARY OF ARGUMENT

The electioneering communication restriction of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 166 Stat. 81, 91 (codified at 2 U.S.C. § 441b(c)), is overbroad as applied to organizations granted tax exemption by the Internal Revenue Service ("IRS") under section 501(c)(3) of the Internal Revenue Code ("the Code"). Sections 203 and 204 of BCRA were designed to prevent only "sham issue ads," which are "the functional equivalent of express advocacy." *McConnell v. FEC*, 540 U.S. 93, 185, 206 (2003). Organizations such as *amici*, organized and operating under section 501(c)(3) of the Code, are already subject to severe restrictions, enforced by the Code and United States Treasury regulations, preventing them from intervening in political campaigns. In light of these restrictions, the

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[2] Additional Interests of *Amici* are included in the Appendix to this brief.

electioneering communication prohibition serves no compelling state interest when applied to charitable organizations. Moreover, section 501(c)(3) organizations do not enjoy the alternative of establishing federally-registered political committees ("PACs") to speak freely within the electioneering communication period, an option this Court found critical when rejecting a facial challenge to the electioneering communication restriction on corporate speech. *See id.* at 204 (citing *FEC v. Beaumont*, 539 U.S. 146, 163 (2003)).

When considering when the First Amendment requires an as-applied exception to the electioneering communication restrictions, this Court should consider and rely on the unique restrictions on section 501(c)(3) organizations, already strictly enforced by the IRS, that make it impossible for them to the sponsor sham issue ads targeted by BCRA, and permit them to speak freely so long as they honor the boundaries mandated by their tax-exempt status.

C. Electioneering Restrictions Are Too Broad

1. Electioneering Communication Prohibition Restricts Communications by 501(c)(3) Organizations

Among other significant changes in federal election law, BCRA amended 2 U.S.C. § 441b to prohibit corporations and labor unions from making a payment for an "electioneering communication." 2 U.S.C. § 441b(b)(2). The prohibition applies to all corporations, including 501(c)(3) organizations that incorporate solely for liability purposes. It bars electioneering communications by charitable corporations even when

paid for with funds contributed only by individuals. *See id.* § 441b(c)(2), (6).

The definition of an "electioneering communication" includes "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office," that is made 30 days before a primary election, or 60 days before a general election, and that can be received by 50,000 or more persons in the relevant district or state. *Id.* § 434(f)(3)(A), (C).[3]

For candidates for President and Vice President, the 30-day electioneering communication period before the primary election will differ from state to state, due to the presidential primary schedule that begins with the Iowa caucuses on January 14, 2008; the electioneering communication period also includes the 30 days before each national political party convention and the days of the convention itself. *See* 11 C.F.R. § 100.29(a)(3)(ii)(A) (2007). Though the primary dates are not yet finalized for either the Democratic or Republican parties, the presidential primary calendar will likely result in an almost continual electioneering communication blackout period for the nationwide reference of presidential candidates between December 15, 2007, and the end of each party's national convention.

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[3] The statutory scheme only includes the "received by 50,000 persons" limitation for electioneering communications that reference a candidate for Senator or Representative to Congress; the Federal Election Commission, by regulation, has also applied this limitation to communications that reference candidates for President or Vice President. *See* 11 C.F.R. § 100.29(a)(3)(ii) (2007).

The definition of "clearly identified" is defined, by Federal Election Commission ("FEC") regulation, to include a candidate's name or photograph; it also includes communications in which "the identify of the candidate is otherwise apparent," including terms such as the term "your Congressman." 11 C.F.R. § 100.29(b)(2). Surprisingly, it even includes a reference to a popular name of legislation identified by the sponsors' name. *See* Electioneering Communications, 67 Fed. Reg. 65,190, 65,200-201 (Oct. 23, 2002). Thus, a reference to "McCain-Feingold," made on television or radio within the electioneering communication period, is considered an "electioneering communication" under BCRA and the promulgated regulations.

In its implementing regulations, the FEC limited the definition of an electioneering communication to a communication "disseminated for a fee." The FEC explained that BCRA's "legislative history abundantly documents that paid advertisements were the focus of the electioneering communication provisions." 67 Fed. Reg. at 65,192. However, that limitation was challenged in the United States District Court for the District of Columbia, which found that the exception was inconsistent with the plain meaning of the statute. *Shays v. FEC*, 337 F. Supp. 2d 28, 129 (D.D.C. 2004), *aff'd*, *Shays v. FEC*, 414 F.3d 76, 109 (D.C. Cir. 2005). Subsequently, the FEC revised its regulation to remove this exception. *See* Electioneering Communications, 70 Fed. Reg. 75,713, 75,715 (Dec. 21, 2005).

The original electioneering communication regulations also contained an exception for any communication that is "paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986." 67 Fed. Reg. at 65,200. The FEC reasoned:

> Section 501(c)(3) organizations are barred as a matter of law from being involved in partisan political activity. The Commission believes the purpose of BCRA is not served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity, simply to foreclose a theoretical threat from organizations that has not been manifested, and which such organizations, by their very nature, do not do.

Id. The FEC noted: "Should the Internal Revenue Service determine, under its own standards for enforcing the tax code, that an organization has acted outside its 501(c)(3) status, the organization would be open to complaints that it has violated or is violating Title II of BCRA." *Id.* The FEC also pledged to work with the IRS to promulgate mutually consistent rules and regulations, as they are required to do by statutory mandate. *See* 2 U.S.C. § 438(f).

This regulatory exception was also challenged in *Shays v. FEC*; the court held that it violated the Administrative Procedures Act. *See Shays*, 337 F. Supp. 2d at 127. The FEC thereafter revised the electioneering communication definition to remove this exception for charitable organizations. *See* 70 Fed. Reg. at 75,714.

To provide an avenue for the broadcast of genuine nonpartisan lobbying communications, a coalition of organizations described in section 501(c) of the Code, including OMB Watch, filed with the FEC a Petition for Rulemaking on February 16, 2006. The Petition requested that the FEC revise 11 C.F.R. § 100.29 to permit "grassroots lobbying" communications. The petition requested an exception from the "electioneering

communication" definition, based on the following six factors:

> (1) "The 'clearly identified federal candidate' is an incumbent public officeholder;" (2) "The communication exclusively discusses a particular current legislative or executive branch matter;" (3) "The communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so;" (4) "If the communication discusses the candidate's position or record on the matter, it does so only by quoting the candidate's own public statements or reciting the candidate's official action, such as a vote, on the matter;" (5) "The communication does not refer to an election, the candidate's candidacy, or a political party;" and (6) "The communication does not refer to the candidate's character, qualifications or fitness for office."

Exception for Certain "Grassroots Lobbying" Communications From the Definition of "Electioneering Communication," 71 Fed. Reg. 52,295, 52,295 (Sep. 5, 2006).[4] On August 29, 2006, the FEC voted to decline the petitioners' request, noting that the litigation in the case presently before this Court "may provide the Commission

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[4] *Amici* believe that FEC regulatory action could alleviate but not cure the constitutional injury occasioned by the overbreadth of the electioneering communication ban as applied to charitable organizations.

with guidance on whether and how the Commission should exercise its discretion in this area." *Id.* at 52,296.

As a result, the current statutory and regulatory regime provides no avenue for a section 501(c)(3) organization that wishes to reference a federal candidate on radio or television during the electioneering communication period to do so. It matters not that the content is entirely neutral and nonpartisan and devoid of electoral content. It matters not that the organization is statutorily forbidden to attempt to influence the election.[5] And it matters not that the organization's communication is broadcast for free as a public service announcement or on public access television or radio.

The electioneering communication restriction, as enacted by Congress, prohibits a section 501(c)(3) organization from airing a grassroots lobbying communication that asks listeners to contact their Member of Congress, even if the communication says nothing about the Member's position on the issue. The restriction requires a public charity sponsoring a C-Span nationally televised educational conference to instruct speakers that they may not mention a federal officeholder or candidate, or even the phrase "your Congressman," if the conference will be in the 30 days before any congressional primary or in the 60 days before the general election. The restriction prohibits a church from broadcasting a service in which a candidate may be in attendance during the electioneering communication period before that candidate's election.

Indeed, the electioneering communication restriction goes so far as to prevent a section 501(c)(3) organization

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[5] *See* section D, *infra*.

from holding a symposium, nationally televised on C-Span, on the very topic of this brief. BCRA is commonly known as the "McCain-Feingold" legislation. Senator McCain is a candidate for nomination for President from the Republican Party. Due to the series of presidential nominating contests, the electioneering communication period for the primary elections will be in place somewhere in the country almost continuously beginning on December 15, 2007. These restrictions do not end until the day after the Republican National Convention, the very day the sixty-day period before the general election begins. Thus, an educational institution's discussion of this very case must wait until after November 4, 2008, if it will be carried nationally via a public access television or radio station.

The electioneering communication restriction prevents wide swaths of educational and nonpartisan speech by section 501(c)(3) organizations. Against the powerful First Amendment interests of these organizations, the absolute ban on corporate electioneering communications cannot stand.

2. Nonprofit Lobbying Is Protected under the First Amendment

"Congress shall make no law respecting . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. This right is "implicit in '[t]he very idea of government, republican in form.'" *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)). This Court has consistently held that the right to petition applies equally to all branches of government. *See Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

> For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.

1 Blackstone's Commentaries editor's app. at 297 (St. George Tucker ed., Philadelphia, Birch & Small 1803), *quoted in New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Goldberg, J., concurring in result).

The First Amendment protects the right of corporations, as well as individuals, to petition the legislature through direct or grassroots lobbying. The discussion of government affairs "is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). "The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment." *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990). Corporations also "contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 8 (1986) (quoting *Bellotti*, 435 U.S. at 783).

The term "grassroots lobbying" is defined by regulation as "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof." Treas. Reg. § 56.4911-2(b)(2)(i) (2007). According to a survey of over 1,700 section

501(c)(3) organizations conducted by OMB Watch in 2002, seventy-eight percent of section 501(c)(3) organizations participate in policy debates through grassroots lobbying. The lobbying causes championed by section 501(c)(3) organizations are used to bring light to otherwise little-known issues, and to mobilize the public on issues of national public importance.

The grassroots lobbying efforts conducted by section 501(c)(3) organizations fall squarely into the protection offered by the First Amendment. These lobbying campaigns are pure speech, directed at legislative officials and the public, with the sole purpose of affecting the shape and direction of public policy. These efforts are vital to a well-functioning democracy.[6]

Often lobbying efforts are undertaken in response to unanticipated legislative developments. These campaigns depend on speed and timeliness; their timing is completely dependent on when legislative issues arise. Section 501(c)(3) organizations cannot simply put their efforts on hold during election years; the rolling primary calendar means that nationwide lobbying efforts are forbidden for much of the year. Moreover, if lobbying efforts cannot be unveiled contemporaneously with the timing of the legislative vote at issue, no matter when that vote occurs,

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[6] "[The right of petition] would seem unnecessary to be expressly provided for in a republican government, since . . . [i]t is impossible that it could be practically denied until the spirit of liberty had wholly disappeared, and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen." 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 645 (5th ed. 1891).

the right to petition will be little more than an academic privilege.[7]

As noted above, in the wake of *Shays v. FEC* and the resulting revision of the electioneering communication regulations, section 501(c)(3) organizations are limited not just with regard to their paid lobbying communications, but also for completely dispassionate educational programming that is broadcast for free on public access television or radio. These activities were not the focus of Congress when enacting BCRA, nor do they bear any threat of influencing federal elections. And yet the broad scope of 2 U.S.C. § 441b(c) restricts these activities just as completely. This prohibition on speech is not justified by the nonexistent threat of electoral influence posed by section 501(c)(3) organizations and the special statutory and regulatory restrictions imposed on them as a result of their tax status.

Amici are not completely silenced during the electioneering communication blackout periods. A corporation, including a charitable organization, may refer to a federal candidate in direct mail, over the telephone, on the Internet or in a pamphlet during a blackout period. These avenues of communication, however, are often more costly and less effective than broadcast communications. *Amici* are also concerned that Congress

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[7] Indeed, legislators and lobbyists can easily take advantage of the blackout to enact legislation hostile to nonprofit organizations' interests, knowing that the nonprofit community will have difficulty mobilizing public opposition.

may extend, as several states already have,[8] the electioneering communication ban to other forms of communication. If the electioneering ban can be constitutionally applied to the broadcast communications of charitable organizations, there is no apparent reason why other means of communication would be entitled to greater constitutional protection.

D. Section 501(c)(3) Organizations Cannot Intervene in Political Campaigns

1. Section 501(c)(3) Organizations Are Prevented From Directly Intervening in Elections

Section 501(c)(3) of the Code requires that organizations described there "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3); *see also id.* § 170(c)(2)(D). This prohibition is absolute; the IRS does not permit section 501(c)(3) organizations from engaging in any political activity, even a *de minimis* amount.

Any violation of this prohibition can result in an organization losing its tax-exempt status entirely. An

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[8] *See* ALASKA STAT. § 15.13.400(5); COLO. CONST. ART. XXVIII, § 2(7); FL. STAT. § 106.011(18); HI. CODE R. § 11-207.6; IDAHO CODE ANN. § 67-6602(f); 10 ILL. COMP. STAT. 5/9-1.14; N.C. GEN. STAT. § 163-278.90(2); OKLA. STAT. tit. 74, § 257:1-1-2; WASH. REV. CODE § 42.17.020(20); W. VA. CODE § 3-8-1A(10); *see also* GUAM CODE ANN. tit. 3, § 19112.1.

organization in violation of this restriction is also subject to fines; so is any individual manager of the organization who engaged in the activity knowing it was a political expenditure. *Id.* § 4955. Moreover, the IRS also has the authority, in the case of "flagrant" political campaign activity, to seek an injunction in federal court to prevent future political expenditures. *Id.* § 7409.

Section 501(c)(3) organizations must apply to the IRS for approval of their tax-exempt status. *See* I.R.C. § 508(a). As part of the application process, they must establish to the IRS's satisfaction that they can meet both the organizational and the operational limitations of section 501(c)(3), including the prohibition on political activity. *See generally* Treas. Reg. § 1.501(c)(3)-1.

The definition of political intervention is extremely broad. Communications that do not "expressly advocate the election or defeat of a clearly identified candidate," *see Buckley v. Valeo*, 424 U.S. 1, 80 (1976), may still be found to be political intervention; the IRS examines "all the facts and circumstances" surrounding the communication to determine whether it is political in nature. Treas. Reg. § 1.527-2(c)(1); *see, e.g., Christian Echoes Nat. Ministry, Inc. v. United States*, 470 F.2d 849, 856 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

Section 501(c)(3) organizations are also strictly limited in their total amount of grassroots lobbying. "No substantial part" of the activities of a section 501(c)(3) organization may be "carrying on propaganda, or otherwise attempting, to influence legislation." I.R.C. § 501(c)(3). The actual amount varies, depending on whether an organization has elected a specific expenditure test, or whether it is subject only to the baseline "substantial part" test. *See id.* § 501(h); *id.* § 4911(c);

Treas. Reg. § 1.501(h)-1(a). Lobbying in excess of the prescribed limits can result in a fine for those organizations subject to the expenditure test, *see* I.R.C. § 4911, and revocation of the organization's tax-exempt status.[9]

The IRS has focused extensively on the political intervention prohibition in recent years, both by providing an increased level of guidance and by strengthening its enforcement activities. In December 2003, the IRS issued a revenue ruling that clarified, through examples, when a communication would be considered to be political intervention.[10] The revenue ruling included six factors that "tend to show that an advocacy communication on a public policy" is, in fact, a political communication:

> a) The communication identifies a candidate for public office;
>
> b) The timing of the communication coincides with an electoral campaign;
>
> c) The communication targets voters in a particular election;

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[9] Private foundations are even more restricted; they cannot engage in any lobbying activities at all. *See id.* § 4945(d)(1).

[10] In fact, this revenue ruling technically addressed only when the activities of a section 501(c)(4), (5), or (6) organization would be deemed political intervention; these organizations may engage in limited amounts of political activity, subject to tax. *See id.* § 527(f). However, for most purposes, the IRS considers the inquiry to be the same. *See* I.R.S. Priv. Ltr. Rul. 96-52-026 (Dec. 27, 1996). Thus, this revenue ruling is considered instructive on the political prohibition on section 501(c)(3) organizations.

d) The communication identifies that candidate's position on the public policy issue that is the subject of the communication;

e) The position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and

f) The communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

Rev. Rul. 2004-6, 2004-1 C.B. 328. More recently, in February 2006 the IRS released a fact sheet with more examples of what the IRS does and does not consider to be political intervention. *See* I.R.S. News Release IR-2006-36 (Feb. 24, 2006).

At the same time, the IRS released the initial results of its Political Activities Compliance Initiative. Through this process, the IRS conducted one hundred thirty-two field examinations of section 501(c)(3) organizations suspected of engaging in prohibited political campaign activity. The IRS also pledged "to provide more and better guidance and move quickly to address prohibited activities." *See id.*

It is now clear that the IRS is taking strong action to both clarify what constituted prohibited political campaign activity, and to take enforcement action against those organizations that violate the prohibition. As a result, section 501(c)(3) status – now more than ever – is an effective barrier to political campaign activity.

2. Section 501(c)(3) Organizations Are Prevented From Operating PACs

When this Court upheld 2 U.S.C. § 441b(c) against a facial challenge, it noted: "in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *See McConnell*, 540 U.S. at 206. The Court was referring to the ability of a corporations or labor union to establish a federally-registered separate segregated fund (a "PAC"), into which individual funds can be solicited from a corporation's stockholders and executive and administrative personnel, or from a labor union's members. *See* 2 U.S.C. § 441b(2). The ability of a corporation or labor union to engage in some political speech, albeit through constrained channels, was crucial to the Court's holding; it was also an important factor when the Court found that the state of Michigan's ban on corporate political contributions was narrowly tailored. *See Austin*, 494 U.S. at 660 (noting that "the Act does not impose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds"). Indeed, even Appellant defends the absolute prohibition on electioneering communications by corporations by explaining: "A corporation or union remains free, moreover, to establish a separate segregated fund and to pay for electioneering communications in unlimited amounts from that fund." (Appellant Br. 7).

Section 501(c)(3) organizations, due to the prohibition on political campaign activity, are prohibited from taking advantage of this option. While the IRS has never made a formal ruling on this precise issue, the statutory and regulatory regime prevents a section 501(c)(3)

organization from engaging in political activity, including creating a subsidiary political account. Informally, the IRS has so advised its agents and the regulated community. *See* J.E. Kindell & J.F. Reilly, *Election Year Issues*, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM 335, 344 (2002) (advising that "an IRC 501(c)(3) organization may not . . . establish political action committees (PACs)").

Moreover, even if a section 501(c)(3) organization could form a political committee account solely to use as a safe harbor, it would ordinarily have extremely few individuals to solicit for contributions: there are no stockholders; the number of executive and administrative personnel are usually small in number; and section 501(c)(3) organizations, unlike their brethren organized under section 501(c)(4), (5), or (6), are rarely organized as membership organizations. Thus, even if there were not a strong legal prohibition to the use of a separate segregated fund, there is an equally strong practical barrier.

The result is that section 501(c)(3) organizations are singled out for silence. Only these organizations, which are prohibited from partisan political intervention as a condition of their tax status, are completely barred from speaking during the electioneering communication periods. The irony could not be greater, because section 501(c)(3) organizations do not pose any of the risks justifying the electioneering communication restrictions on corporate speech.

E. Section 501(c)(3) Organizations Pose No Risk of Corruption or Distortion

This Court has only upheld the regulation of freedom of speech in the political sphere if justified by one of two compelling interests. The first is "corruption or the appearance of corruption," *McConnell*, 540 U.S. at 179; the second is "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." *See Austin*, 494 U.S. at 660, *quoted in McConnell*, 540 U.S. at 205. Neither of these justifications can justify onerous restrictions on the lobbying and educational activities of section 501(c)(3) organizations.

Independent political expenditures do not "appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Buckley*, 424 U.S. at 46. The lobbying and educational efforts of section 501(c)(3) organizations, cabined within the IRS's strict prohibition against political campaign activity, pose even less of a danger. Moreover, because of the existing restrictions on coordinated communications, a section 501(c)(3) organization cannot distribute lobbying or educational communications within the electioneering communication period that reference a federal candidate "in cooperation, consultation, or concert," with either that candidate or a political party. *See* 2 U.S.C. § 441a(a)(7); 11 C.F.R. § 109.21.[11] Simply put, there is no legitimate

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[11] No candidate or political party may request or suggest the communication; may be materially involved in the communication; may have a substantial discussion with the sponsor regarding the communication; or may use a common vendor or former employee to coordinate the communication. *See id.*

risk of corruption or the appearance thereof from the educational and lobbying activities of section 501(c)(3) organizations.

Nor does the lobbying and educational activity of section 501(c)(3) organizations raise "the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986). Section 501(c)(3) organizations cannot accumulate commercial wealth to dominate the political debate; their resources, by law, must be devoted to public purposes. They do not "exercise control over large aggregations of capitol," *US. V. UAW-CIO*, 352 U.S. 567, 585 (1957); nor do they hold "substantial aggregations of wealth amassed by the special advantages which go to the corporate form of organization." *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982). Quite to the contrary, section 501(c)(3) organizations often serve as a counterweight to the immense resources that corporations expend to influence government policy.

Indeed, there is no evidence – none at all – to suggest that genuine section 501(c)(3) lobbying or educational activities are a vehicle for "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." *Austin*, 494 U.S. at 660. Unlike "sham issue ads," which this Court found to be the "functional equivalent" of express advocacy, legitimate lobbying efforts are barred, by statute and IRS regulation, from being "intended to influence the voters' decisions." *McConnell*, 540 U.S. at 206. There is no evidence that section 501(c)(3) organizations produce the "bogus issue advertising" that was the focus of the electioneering communication restriction. *See id.* at 129. The evidence Congress compiled when passing BCRA, on

which this Court relied heavily in upholding the electioneering communication restrictions, never referenced section 501(c)(3) organizations. *See id.* at 126-32. More recently, the FEC found no evidence during its rulemakings that suggest sham issue ads sponsored by 501(c)(3) organizations are a factor. *See* 70 Fed. Reg. at 75, 714; 67 Fed. Reg. at 65,200.

F. The Court Should Permit Section 501(c)(3) Organizations To Operate Freely within the Limits of their Tax Structure

This Court, when upholding the electioneering communication restriction against a facial challenge, "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *McConnell*, 540 U.S. at 206 n.88. The Court is now faced with a group of organizations that, because of their tax status and rigorous IRS oversight, can only sponsor "genuine issue ads." When considering the contours of a First Amendment as-applied exception to the electioneering communication restriction, this Court should rely on that tax status to allow greater flexibility for section 501(c)(3) organizations.

There is precedent, in both the Court's interpretation of the corporate ban on expenditures and in the FEC's regulations, for reliance on tax status for increased First Amendment protection. Furthermore, the FEC has previously recognized that the political restrictions which are a condition of section 501(c)(3) status allow greater freedom for section 501(c)(3) organizations without the risk that they will use that freedom for political purposes.

In the case *FEC v. Massachusetts Citizens for Life, Inc.*, this Court confronted an as-applied challenge to the

statutory prohibition on corporate independent expenditures. It ruled that the First Amendment did not permit the prohibition to extend to the appellant. "We acknowledge the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace. . . . [T]hat justification does not extend uniformly to all corporations." 479 U.S. at 263. The Court went on to explain the factors that differentiated the appellant from the commercial enterprises that remained bound by the statutory prohibition:

> First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. . . . Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. . . . Third, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities.

Id. at 263-64. The Court also cautioned, "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262.

When the FEC promulgated regulations to define the outer boundaries of this exception and what it meant to be an organization "formed for the express purpose of political ideas" but not one whose "major purpose may be regarded as campaign activity," it relied explicitly on the tax status of a corporation. A "qualified nonprofit corporation" that is exempt from the prohibition on corporate independent expenditures and electioneering communications must be, among other requirements,

"described in 26 U.S.C. 501(c)(4)." 11 C.F.R. § 114.10(c)(5). In its rulemaking, the FEC explained: "Section 501(c)(4) describes a class of organizations known as social welfare organizations that are exempt from certain tax obligations. . . . A corporation must be a social welfare organization in order to be exempt from the prohibition on independent expenditures." Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,301 (July 6, 1995). The FEC reasoned that because section 501(c)(4) status permitted "a limited amount of political activity," but not so much that it becomes an organization's primary purpose, the tax status of the organization should be made a requirement to the corporate expenditure exception. *See id.*; *see also* Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii), (a)(2)(i).

There is also precedent in the FEC's regulations for the permissive treatment of section 501(c)(3) organizations due to the strict political activity prohibition enforced by the IRS. As noted above, the Court in *MCFL* carved an exception only for nonprofit corporations that did not accept contributions from labor unions or business corporations. *See* 479 U.S. at 264. The FEC's definition of a "qualified nonprofit corporation" imported this concept, requiring that an organization "[d]oes not directly or indirectly accept donations of anything of value from business corporations, or labor organizations." *See* 11 C.F.R. § 114.10(c)(4). However, there was a real concern that this clause would prevent qualifying organizations from receiving grants from section 501(c)(3) organizations that do accept contributions from business corporations and labor unions. And indeed, the FEC noted that as a general matter, "if a corporation accepts donations from an organization that accepts donations from these entities, the

corporation will not be a qualified nonprofit corporation." 60 Fed. Reg. at 35,300.

In the face of this worry, the FEC made a regulatory exception for section 501(c)(3) organizations.

> However, under IRS rules, section 501(c)(4) organizations that receive funds from a section 501(c)(3) organization are required to use those funds in a way that is consistent with the section 501(c)(3) organization's exempt purpose. Since political campaign intervention is never consistent with a section 501(c)(3) organization's exempt purpose, the recipient section 501(c)(4) organization is not supposed to use the grant for campaign activity. . . . So long as these safeguards exist, the Commission will not regard a grant from a section 501(c)(3) organization to a qualified nonprofit corporation as an indirect donation from a business corporation or labor organization.

Id. at 35,301. The FEC explicitly relied on the restrictions inherent in section 501(c)(3) tax status to exempt those organizations from the ban on the receipt of indirect corporate contributions by a qualified nonprofit corporation. It qualified that exemption on the continued enforcement of the political campaign activity ban to prevent a loophole from developing should tax law change to remove this exemption.

Section 501(c)(3) organizations are due similar treatment under the electioneering communication restriction. As explained above, section 501(c)(3) organizations are structurally unable to air the "sham issue ads" targeted by the electioneering communication restriction; as a result, they pose no threat of either

corruption, or distortion of the political arena. Because they cannot create political committees for use as a safe harbor, the electioneering communication restriction acts as a complete prior restraint during the electioneering communication periods. The First Amendment does not permit the electioneering communication restrictions to so completely silent section 501(c)(3) organizations

Amici propose that when this Court crafts an as-applied constitutional exception to the electioneering communication restriction, it make clear that the provision cannot be constitutionally applied to section 501(c)(3) organizations that are barred by statute and regulation from intervening in political campaigns, so long as the following conditions are met: their tax status has been approved by the IRS; they are operating within the bounds of their tax status; and the broadcast or radio communication in question is not political campaign activity as defined by the IRS. Section 501(c)(3) organizations face a dizzying array of rules and regulations to comply with IRS requirements. For such organizations, making the bounds of the as-applied exception coterminous with the tax restrictions already in place simplifies an already too complicated regime.

In the wake of such guidance from the Court, the FEC and the IRS can easily cooperate to issue joint enforcement regulations if they deem it necessary. Indeed, both agencies are already under a statutory mandate to work together to promulgate "mutually consistent" regulations, and to report their progress annually to Congress. 2 U.S.C. § 438(f).

CONCLUSION

Amici, and section 501(c)(3) organizations generally, must be able to speak and engage in constitutionally protected grassroots lobbying whenever issues erupt in Congress, even during the electioneering communication periods. Section 501(c)(3) organizations were not the target of BCRA's restriction on corporate speech, and there is no legitimate case to be made that they threaten any of the ills justifying corporate restrictions on political speech; yet despite the initial efforts of the FEC to exempt them, the broad wording of the statutory prohibition, combined with these organizations' inability to form separate segregated funds, has resulted in a complete prior restraint during most of the election year.

Amici urge this Court to consider the as-applied challenge in this case and find in favor of Appellee, and we support Appellee's right to conduct certain restricted lobbying activities during the electioneering communication periods. Yet the Court should also consider the special circumstances presented by section 501(c)(3) organizations. In the case before it, this Court has an opportunity to explain to the regulated community the contours of the First Amendment protections for nonprofit organizations. *Amici* urge the Court to take the occasion to grant both clarity and relief to section 501(c)(3) organizations.

Respectfully submitted,

Robert F. Bauer
Counsel of Record
Karl J. Sandstrom
Ezra W. Reese
PERKINS COIE
607 Fourteenth Street, N.W.
Washington, D.C. 20005
(202) 628-6600

Counsel for Amici Curiae

APPENDIX

ADDITIONAL INTERESTS OF AMICI

National Organizations:

Alliance for Healthy Homes

The Alliance for Healthy Homes is a national, nonprofit, public interest organization working to prevent and eliminate hazards in our homes that can harm the health of children, families, and other residents. These hazards include lead, mold, carbon monoxide, radon, pests, and pesticides. The Alliance is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code.

American Conservative Union Foundation

The American Conservative Union Foundation ("ACUF") is the educational and charitable arm of the American Conservative Union ("ACU"), the nation's oldest conservative lobbying organization. ACUF created the "Conservative University," designed to place all of the classic documents and books of the conservative movement in one, central location. The mission of the Conservative University is to train the next generation of conservative leaders nationally by providing them, in a systematic, easily available and focused manner, the intellectual tools necessary to become successful political and civic leaders. It is a mission that must be advanced or the movement will die. There are many things taught to conservatives but the specific mission here is to provide a fundamental core curriculum and set of ideas that can provide a lifetime guide to political and social decision-making.

Center for Lobbying in the Public Interest

The Center for Lobbying in the Public Interest promotes, supports and protects nonprofit advocacy and lobbying in order to strengthen participation in our democratic society and advance charitable missions. It accomplishes this mission through strategic messaging, a national training program, targeted resources housed on its website, www.clpi.org, and co-convening of left/right coalitions to expand and defend nonprofit advocacy rights.

Independence Institute

The Independence Institute is a 501(c)(3) educational organization, founded in 1985. Located in Colorado, it is a state-based think tank. The Independence Institute is established upon the eternal truths of the Declaration of Independence. The Institute is a nonpartisan, nonprofit public policy research organization dedicated to providing timely information to concerned citizens, government officials, and public opinion leaders. The Independence Institute is involved in local, state, national, and international issues.

Much of the Institute's work is carried out through several Centers which are part of the Institute: the Education Policy Center, the Health Care Policy Center, the Second Amendment Project, the Center for the American Dream, the Campus Accountability Project, and the Fiscal Policy Center. The work of all these Centers often intersects with policy questions being debated by Congress.

The Independence Institute communicates with the public in a very broad variety of ways: through newspaper articles, television and radio programs, books, law review articles, presentations at scholarly conferences, legislative

testimony, e-mail, podcasts, long monographs, and shorter research papers. For many years, the Independence Institute has also communicated with the public through radio advertising, one of the communications media which is censored by the speech restrictions enacted by Congress in 2002.

Radio advertising is a very important part of the Independence Institute's educational mission. The Institute's other means of communications (such as research papers and newspaper op-eds) are certainly important, but they reach only a small fraction of the public – a relatively elite fraction that already has a high pre-existing interest in policy questions. In contrast, radio advertising allows the Institute to communicate with a much broader group of the public. Such advertising allows the Institute to share its ideas with hundreds of thousands or millions of people whom, as a practical matter, the Institute has no other capacity to reach. Significantly, radio advertising allows the Institute to present its ideas in their purest form – without the limitations (and, sometimes, distortions) of those ideas being rephrased or selectively quoted by a reporter.

The speech restrictions imposed in 2002 chill the Independence Institute's ability to communicate with the public about important federal questions during the thirty and sixty days censorship periods. The Independence Institute has no desire to advocate for the election of federal candidates (or, for that matter, state and local candidates). In twenty years, the Independence Institute has never done so. The Independence Institute has a perfect record of compliance with all federal, state, and local laws against candidate advocacy by non-profit organizations. Indeed, because the Independence Institute is founded to advance particular ideas – namely the eternal

truths of the Declaration of Independence, as applied to contemporary concerns – we will often praise a particular Congressperson one week (such as for voting against pork-barrel spending), and criticize the same Congressperson the next week (such as for supporting restrictions on a Bill of Rights freedom).

NARAL Pro-Choice America Foundation

NARAL Pro-Choice America Foundation's mission is to support and protect, as a fundamental right and value, a woman's freedom to make personal decisions regarding the full range of reproductive choices through education, training, organizing, legal action, and public policy.

National Council of Jewish Women

The National Council of Jewish Women, Inc. ("NCJW") is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children, and families and to ensure individual rights and freedoms for all through its network of 90,000 members, supporters, and volunteers nationwide.

National Council of Nonprofit Associations

The National Council of Nonprofit Associations ("NCNA") is the network of state and regional nonprofit associations serving over 22,000 members in 46 states and the District of Columbia. NCNA links local organizations to a national audience through state associations and helps small and midsized nonprofits manage and lead more effectively; collaborate and exchange solutions; save money through group buying opportunities; engage in critical policy issues affecting the sector; and achieve greater impact in their communities.

National Legal and Policy Center

The National Legal and Policy Center ("NLPC") promotes ethics in public life through research, education and legal action. NLPC is a 501(c)(3) non-profit foundation which has played an active role in the public policy debate regarding issues affecting governmental and public accountability. In furtherance of its mission, NLPC has been asked to testify on numerous occasions before Congressional committees and has participated in public policy debates. NLPC strongly opposes restrictions which will have the effect of chilling First Amendment rights of non-profits to vigorously engage in public discussion on a wide array of issues which are being considered before Congress at any given time.

National Low Income Housing Coalition

The National Low Income Housing Coalition is dedicated solely to ending America's affordable housing crisis. It believes that this is achievable, that the affordable housing crisis is a problem that Americans are capable of solving. While it is concerned about the housing circumstances of all low income people, it focuses its advocacy on those with the most serious housing problems, the lowest income households.

Violence Policy Center

The Violence Policy Center ("VPC") is a national educational organization that engages in research and policy development to prevent firearm-related death and injury in America. The VPC regularly communicates with grassroots organizations and individuals in an effort to educate the public, policymakers and the media, and to activate support for gun violence prevention strategies.

State Organizations:

California Association of Nonprofits

With over 1,800 members, the California Association of Nonprofits ("CAN") mission is to: protect, strengthen and advance the influence, accountability and effectiveness of nonprofit organizations in a manner that builds their capacity to accomplish their missions and reserve and promote the idealism and value of nonprofit organizations in California. The California Association of nonprofits is a 501 (c) 3 public benefit corporation.

Nonprofit Coordinating Committee of New York, Inc.

The Nonprofit Coordinating Committee of New York, Inc., ("NPCC") is the voice and information source for New York nonprofits. Established in 1984, NPCC informs and connects nonprofit leaders, saves nonprofits money, and strengthens the nonprofit sector's relations with government. NPCC publishes a monthly newsletter, *New York Nonprofits*, offers workshops and roundtables on management issues, provides cost-saving vendor services, manages a Government Relations Committee that works on sector-wide government and legislative issues, and maintains a website loaded with information on operating a nonprofit. NPCC has more than 1,400 dues-paying members in the New York City area.

The N.C. Center for Nonprofits

The N.C. Center for Nonprofits is a private, 501(c)(3) nonprofit organization that serves as a statewide network for nonprofit boards and staffs, an information center on effective organizational practices, and an advocate for the nonprofit sector as a whole. It offers services directly to

all sizes and types of 501(c)(3) nonprofits, and it works closely with other local, state and national groups that assist nonprofits. It communicates regularly with its membership of more than 1,600 organizations on a wide variety of important issues.

Housing Alliance of Pennsylvania

Established in 1985, The Housing Alliance of Pennsylvania is a statewide membership organization working for a home within reach of every Pennsylvanian, especially those with low incomes. It conducts research, education and outreach to fulfill its mission.

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Nos. 06-969 & 06-970

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Appellant*,

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*.

SENATOR JOHN MCCAIN, ET AL., *Appellants*,

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*.

On Appeal from the United States District Court for the District of Columbia

BRIEF AMICI CURIAE OF COMMITTEE FOR ECONOMIC DEVELOPMENT, NORMAN ORNSTEIN, THOMAS MANN, AND ANTHONY CORRADO IN SUPPORT OF APPELLANTS

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
PAUL A. WERNER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167 (1998)	*passim*

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are a non-profit independent research and policy organization of approximately 250 business leaders and educators as well as three political scientists who have dedicated much of their careers to studying and analyzing Congress, federal elections, campaign finance, and American politics, and who have written extensively, both individually and jointly, on those subjects.[1]

The Committee for Economic Development (CED) was formed more than 60 years ago to advance policies that promote stable economic growth and enhance the standard of living and range of opportunities enjoyed by all Americans. Owing to the fact that corruption in government or its appearance impacts the economy and erodes confidence both in our democratic institutions and business community, CED has proposed significant reforms to our federal election laws in order to strengthen our system of campaign finance. *See Investing in the People's Business: A Business Proposal for Campaign Finance Reform* (CED 1999) [*Business Proposal for Campaign Reform*]. CED also participated in the litigation that led to the decision in *McConnell* v. *FEC*, 540 U.S. 93 (2003), and filed a brief *amici curiae* upon which this Court relied. *See id.* at 125 n.13.

Anthony J. Corrado, Jr. is a Professor of Government at Colby College and Chair of the Board of Trustees of the Campaign Finance Institute. He served as an expert witness in *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001), and this Court cited and quoted his expert statement in its opinion in that case.

Thomas E. Mann is a Senior Fellow in Governance Studies at the Brookings Institution. He served as an expert witness in *McConnell* v. *FEC*, 251 F. Supp. 2d 176 (D.D.C.), *aff'd in*

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

part & rev'd in part, 540 U.S. 93 (2003), and this Court cited and quoted his expert report in its opinion in that case. *See* 540 U.S. at 124 nn.8, 9, 11 & 12; *id.* at 148; *id.* at 155.

Norman J. Ornstein is a Resident Scholar at the American Enterprise Institute for Public Policy Research. He is the founder and director of the Campaign Finance Working Group, a group of scholars and practitioners who helped craft the McCain-Feingold legislation.

Stemming from their expertise and interest in federal elections and campaign finance reform, Professor Corrado, Dr. Ornstein, and Dr. Mann have filed *amici* briefs in previous cases before this Court involving election law issues.[2]

All of the *amici* have a great interest in ensuring that the recent reforms that they have been part of bringing to fruition and that have strengthened our federal campaign finance system are not undermined through judicial interpretations, and offer their views to aid the Court in its review of the instant case. Their brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a); the requisite consent letters have been filed with the Clerk of this Court.

INTRODUCTION

This case is before the Court for the second time. It involves an as-applied challenge to Section 203 of the Bipartisan Campaign Finance Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91-92. That Act overhauled our federal election laws by amending, *inter alia*, the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. § 431 *et seq*. *See McConnell*, 540 U.S. at 114. Among BCRA's amendments to FECA is a provision prohibiting corporations and unions from financing, with general treasury funds,

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[2] *See Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410 (2006) (per curiam) (Corrado, Mann & Ornstein); *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004) (Mann & Ornstein); *McConnell* v. *FEC*, *supra* (Ornstein); *FEC* v. *Colorado Republican Fed. Campaign Comm.*, *supra* (Mann); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (Mann).

"electioneering communication[s]"—*i.e.*, communications referring to a federal office candidate and broadcast within 30 days of a primary or 60 days of a general election in the candidate's jurisdiction. *See* 2 U.S.C. § 441b(b)(2). In *McConnell*, this Court sustained most of BCRA's provisions against constitutional challenge. *See* 540 U.S. at 203-209. There, the Court rejected a First Amendment *facial* challenge to Section 203, holding that the provision was neither fatally overbroad nor fatally underinclusive. *Id.* at 207-208.

Wisconsin Right to Life, Inc. (WRTL) now brings an as-applied challenge to the same provision. WRTL is a non-profit, non-stock ideological advocacy corporation organized under the laws of Wisconsin that the Internal Revenue Service recognizes as tax-exempt under Section 501(c)(4) of the Internal Revenue Code. J.S. App. 2a-3a. It does not qualify for any recognized exemption allowing it to fund electioneering communications from its general treasury account because it is neither a "qualified nonprofit corporation" under 11 C.F.R. § 114.10 nor fits the exception for 501(c)(4) corporations provided by 2 U.S.C. § 441b(c)(2). *Id.* at 3a n.2. It administers a segregated account for campaign-related activity in the form of a political action committee—a PAC. *Id.* at 58a.

United States Senator Russell Feingold of Wisconsin ran for reelection in 2004. His challengers made a campaign issue of his support for "filibusters" of the President's nominees for federal judgeships. *Id.* In March 2004, WRTL's PAC endorsed three candidates opposing Senator Feingold and "announced that the defeat of Senator Feingold was a priority." *Id.* On July 14, 2004, WRTL issued a news release criticizing Senator Feingold's "record on Senate filibusters against judicial nominees." *Id.* WRTL used a variety of non-broadcast communications to criticize Senate filibusters of judicial nominees. *Id.* at 58a-59a.

On July 26, 2004, WRTL began using its general treasury funds –rather than its PAC funds– to air three broadcast ads criticizing the judicial filibuster tactic and specifically naming Senator Feingold. *Id.* at 59a-60a. In one ad, the

listener hears a father interrupting his daughter's wedding ceremony to "share a few tips on how to properly install drywall." *Id.* at 66a-67a. This set up is followed by the narrator opining that "[s]ometimes it's just not fair to delay an important decision" but, in Washington, "a group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote." *Id.* at 67a. The narrator then urges the listener to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster."[3] *Id.* Each ad features a different plot, but all three play on the same needless-delay theme and essentially convey the same message. *Id.* at 69a, 70a.

Anticipating that the advertisements would constitute "electioneering communication[s]" under BCRA if aired during the period between August 15, 2004, and November 2, 2004, WRTL sued the Federal Election Commission in federal district court. *Id.* at 59a. It alleged that BCRA's prohibition on financing electioneering communications with general treasury funds is unconstitutional as applied to its advertisements and moved for a preliminary injunction. *Id.*

The District Court denied WRTL's motion, concluding that its "showing" failed to meet the standard for granting such relief, *id.* at 60a, in large measure because this Court's rejection of a facial constitutional challenge to BCRA Section 203 "le[ft] no room for the kind of 'as applied' challenge that WRTL propounds," *id.* at 61a. However, its reading of *McConnell* was "but one reason" it found WRTL's lawsuit without hope of success. *Id.* at 62a. It went on to observe that, in light of their timing and the objectives of WRTL's PAC, the ads "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id.*

Following its denial of a preliminary injunction, the District Court dismissed WRTL's lawsuit. *Id.* at 55a-56a. This

[3] While the ads contain no contact information for either Senators Feingold or Kohl, they direct listeners or viewers to a website critical of Senator Feingold's record in office.

Court later reversed that judgment, concluding that, "[i]n upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges." *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410, 126 S. Ct. 1016, 1018 (2006) (per curiam). It declined, however, to consider the District Court's suggestion that "WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating," finding it "ambigu[ous]" whether that observation was intended as an alternative ground for decision. *Id.* Accordingly, the case was remanded for the District Court to "consider the merits of WRTL's as-applied challenge in the first instance." *Id.*

On remand, and after an expedited discovery period, the District Court granted summary judgment in WRTL's favor. J.S. App. at 2a. In assessing whether WRTL's ads constituted express advocacy or its functional equivalent, it eschewed any reliance on the intent or effect of the ads, finding such reliance both "practically" and "theoretically unacceptable" and "dangerous and undesirable when First Amendment freedoms are at stake." *Id.* at 19a-20a. In its view, "the judiciary, in conducting First Amendment analysis, should not be in the business of trying to read any speaker's mind." *Id.* at 22a. The District Court thus limited its inquiry to assessing whether the "language within the four corners of the anti-filibuster ads"

> (1) describe[s] a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the future; (2) refer[s] to the prior voting record or current position of the named candidate on the issue described; (3) exhort[s] the listener to do anything other than contact the candidate about the described issue; (4) promote[s], attack[s], support[s], or oppose[s] the named candidate; and (5) refer[s] to the upcoming election, candidacy, and/or political party of the candidate. [*Id.*]

Under this approach, the District Court found that, "on their face, WRTL's three 2004 anti-filibuster advertisements were not 'intended to influence the voters' decisions.' " *Id.* at 24a. This conclusion obviated any need for the court to "analyze

whether the ads *in fact* would have—or potentially could have—affected Senator Feingold's reelection." *Id.* (emphasis in original).

The District Court further concluded that the government could assert no compelling interest in regulating genuine issue ads such as WRTL's under BCRA. *Id.* at 28a. Unlike express advocacy or its functional equivalent, it explained that genuine issue ads do not bear on a candidate's fitness for office and thus implicate no concern about "political corruption and public cynicism in government." *Id.* at 27a.

Judge Roberts dissented from the grant of summary judgment, concluding that the majority's approach "is inconsistent with *McConnell*, is inconsistent with this panel's own prior rulings, and finds little support in logic." *Id.* at 30a.

SUMMARY OF ARGUMENT

Preventing corporations, unions, and national banks from using general treasury funds to influence federal elections is not a novel congressional goal; it is one that Congress has pursued for more than a century. BCRA is only its most recent effort "to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." *McConnell*, 540 U.S. at 115 (internal quotation marks & citation omitted).

Section 203 extends a longstanding prohibition against the use of corporate and union treasury funds for ads that expressly advocate the election or defeat of a federal candidate to cover a newly-defined form of communication—*i.e.*, electioneering communications. Based on overwhelming evidence, Congress concluded that this extension was necessary to prevent corporations and unions from circumventing the pre-existing FECA prohibition by funding with general treasury revenues ads that, while falling short of prohibited "express advocacy," were no less calculated to influence federal elections and likely had that effect. Section 203 thus closed a loophole in FECA that corporations and unions exploited in past elections.

This Court upheld BCRA Section 203 against a facial constitutional attack in *McConnell*. Yet, in striking that same statute down as applied to WRTL's ads, the District Court overlooked this Court's core rationale for upholding the provision on its face. In addition to deviating from the approach taken in *McConnell*, the District Court also deviated from the traditional approach to as-applied challenges—which are fact intensive inquiries—on the mistaken belief that a speaker's intent or purpose for communicating a message is beyond the bounds of judicial inquiry. If future as-applied challenges to Section 203 are reviewed in the same contextual vacuum fashioned here by the court below, Congress's effort to capture ads that are the functional equivalent of express advocacy will inevitably be lost as political actors push the limits of the District Court's "four corners" rule—a crabbed rule that harkens a return to the pre-BCRA "magic word" days.

In any event, the ads that WRTL sought to air during BCRA's pre-election blackout period are, at bottom, the very kind of sham issue ads—*i.e.*, ads about *candidates* masquerading as ads about *issues*—that Congress expressly sought with BCRA Section 203 to prohibit. As is obvious from the timing, content, and context of WRTL's ads, they were designed to influence Senator Feingold's bid for reelection and, if permitted to air, would likely have had just that effect.

ARGUMENT

I. BCRA SECTION 203 CLOSED A LOOPHOLE IN THE FEDERAL CAMPAIGN FINANCE REGIME THAT CORPORATIONS AND UNIONS HAD EXPLOITED IN PREVIOUS ELECTIONS.

"Since 1907, there has been continual congressional attention to corporate political activity, sometimes resulting in refinement of the law, sometimes in overhaul." *FEC* v. *Beaumont*, 539 U.S. 146, 153 (2003). BCRA Section 203 and the definition of "electioneering communication" fall into the former category. Although that provision extends the prohibition on the spending of corporate and union

general treasury funds in connection with federal elections to encompass a newly-defined form of communication, since the Court's seminal ruling in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *McConnell*, 540 U.S. at 203. Section 203 is no more than a modification of pre-existing law needed to " 'plug [an] existing loophole' " in that longstanding prohibition. *United States* v. *International Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 582, 585 (1957) (*UAW*) (quoting S. Rep. No. 1, pt. 2, 80th Cong., 1st Sess. 38-39 (1947)).

1. This Court is mindful of the "historical prologue" of a challenged provision of federal election law, *Beaumont*, 539 U.S. at 156; *see UAW*, 352 U.S. at 570 ("Appreciation of the circumstances that begot this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us."), and it has recognized that the prohibition on corporate and union general treasury expenditures in connection with federal elections has long been a cornerstone of federal election law. *See Beaumont*, 539 U.S. at 152-154. That restriction reflects an abiding concern with the ability of corporations and unions to leverage their state-sanctioned privileges and to aggregate large amounts of capital into unfair political advantages. *See Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658-659 (1990); *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 207-208 (1982) (*NRWC*); *UAW*, 352 U.S. at 585.

Congress made its initial foray into the arena of campaign finance regulation in 1907. It responded to President Roosevelt's call for a ban on corporate political contributions "not with half measures, but with the Tillman Act," which "banned any corporation whatever from making a money contribution in connection with federal elections." *Beaumont*, 539 U.S. at 153 (internal quotation marks & citation

omitted). In 1925, it extended the Tillman Act's prohibition on corporate contributions to encompass "anything of value" and by criminalizing the giving and receiving of corporate contributions. *See NRWC*, 459 U.S. at 209 (citing Corrupt Practices Act, 1925, §§ 301, 313, 43 Stat. 1070, 1074). Congress later extended the coverage of this prohibition to include labor unions. *See NRWC*, 459 U.S. at 209 (noting that "union contributions in connection with federal elections were prohibited altogether" by the War Labor Disputes Act of 1943). And, later still, Congress extended the scope of this prohibition to include "expenditures" as well as contributions. *See McConnell*, 540 U.S. at 117.

In its "steady improvement of the national election laws," *id.*, Congress enacted FECA in 1972, which "ratified the earlier prohibition on the use of corporate and union general treasury funds for political contributions and expenditures." *Id.* at 118. Specifically, FECA Section 441b, which constituted "merely a refinement of th[e] gradual development of the federal election statute," *NRWC*, 459 U.S. at 209, made it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any" federal election. 2 U.S.C. § 441b(a); *see FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 241 (1986) (*MCFL*). The term "expenditure" included "anything of value * * * for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). While barring expenditures of general treasury funds, however, FECA "expressly permitted corporations and unions to establish and administer separate segregated funds (commonly known as political action committees, or PACs) for election-related contributions and expenditures." *McConnell*, 540 U.S. at 118; *see MCFL*, 479 U.S. at 241; *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 409-410 (1972).

2. FECA Section 441b's prohibition against corporate and union expenditures of "anything of value" in connection with federal elections was later modified by this Court in a way that ultimately prompted Congress to enact BCRA Section 203. In *MCFL*, this Court accepted the argument that FECA

Section 441b "necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates" and held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 248-249. This requirement stemmed from the Court's own prior decision in *Buckley* v. *Valeo*, *supra*, which—in order to avoid vagueness and overbreadth concerns inhering in a different FECA provision—held that "expenditure encompassed 'only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.' " *Id.* (quoting *Buckley*, 424 U.S. at 80). As the *MCFL* Court explained, *Buckley* "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." 479 U.S. at 249. *Buckley* identified eight such "more pointed exhortations"—namely, "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject," 424 U.S. at 44 n.52—which later became "known as the 'magic words' requirement." *McConnell*, 540 U.S. at 191.

"As a result of *MCFL*, corporations and labor unions were permitted to use their general treasury funds on independent expenditures in connection with a federal election, provided that those independent expenditures did not contain words of 'express advocacy.' " *McConnell* v. *FEC*, 251 F. Supp. 2d at 525-526 (Kollar-Kotelly, J.) (footnote omitted)). That meant that "corporations and labor unions could use their general treasury funds to pay for an advertisement *which influenced a federal election*, provided that the corporation or labor union did not use any of *Buckley*'s 'magic words' in the advertisement." *Id.* at 526 (emphasis added).

3. "[E]xperience demonstrates how candidates, donors, and parties test the limits of the current law." *Beaumont*, 539 U.S. at 155 (internal quotation marks & citation omitted). The prohibition contained in FECA Section 441b (qualified by the magic words requirement) proved no exception to this lesson of experience. In the years following *MCFL*, corporations and labor unions tested FECA Section 441b's prohibi-

tion by making expenditures on ads that eschewed reliance on *Buckley*'s "magic words" but were no less effective at influencing federal elections than communications containing "pointed exhortations" of support for or opposition to candidates for federal office. *See, e.g., McConnell*, 251 F. Supp. 2d at 526 (Kollar-Kotelly, J.). Such ads "were attractive to organizations and candidates precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money." *McConnell*, 540 U.S. at 128. As Dr. Mann explained in his report in the *McConnell* litigation, research concerning this period reveals "extensive and elaborate efforts by parties, candidates, unions, corporations and groups to exploit this new issue advocacy loophole to avoid the strictures of federal election law." Report of Thomas E. Mann 20-21 [Mann Report].

4. The late 1990s were a boom time for issue advocacy during which "[c]orporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads." *McConnell*, 540 U.S. at 127. The Annenberg Center for Public Policy, which has studied "issue advocacy" since the early 1990s, concluded that "the numbers of ads, groups, and dollars spent on issue advocacy * * * climbed" markedly from the 1996 to the 2000 election cycle. *McConnell*, 251 F. Supp. 2d at 879 (Leon, J.). It found that the 1995-96 election cycle saw about "$135 million to $150 million * * * spent on multiple broadcasts of about 100 ads." *Id.*

CED has found that "[d]uring the 1996 election cycle, a wide array of party organizations and other groups seized on the issue advocacy distinction and spent tens of millions of dollars on advertisements carefully designed to avoid restrictions of federal law." *Business Proposal for Campaign Reform* 29. CED estimated that "party organizations spent at least $100 million on issue advertising in 1996." *Id.*; *see also id.* (noting that "total amount spent on issue ads during the 1996 election is not known"). These ads "were broadcast in markets across the nation and aired in every key congres-

sional race in the country," and "[a]lmost all the commercials broadcast by these organizations featured specific federal candidates, and most were aired in the final six weeks of the general election campaign." *Id.*

The numbers only grew during the next election cycle: "[T]he Annenberg Public Policy Center found that 77 organizations aired 423 advertisements at a cost of between $250 million and $340 million." *McConnell*, 251 F. Supp. 2d at 879 (Leon, J.). During this cycle, "836 issue ads were broadcast in 30 states during the final 60 days before the election, of which an estimated 70 percent were sponsored by major parties." *Business Proposal for Campaign Reform* 29.

During the "1999-2000 election cycle, the Annenberg Center found that 130 groups spent over an estimated $500 million on 1,100 distinct advertisements." *Id.* In passing BCRA, the Annenberg Center's tracking of the rise of organizations' reliance on issue advocacy did not escape Congress's attention. *See* 147 Cong. Rec. S2455-56 (daily ed. Mar. 19, 2001).

5. The meteoric rise in issue ads was not a coincidence but a strategy adopted by organizations intent on influencing federal elections. As Dr. Mann explained in his report, "[p]arties and outside groups used issue advocacy as a cover to finance campaigns for and against federal candidates in targeted races." Mann Report 24. CED has similarly observed that "issue advocacy * * * became the new strategy for election spending, especially for organizations not allowed to make direct contributions in federal campaigns." *Business Proposal for Campaign Reform* 29.

Two judges on the three-judge District Court convened to review the pre-enforcement challenge to BCRA similarly found that organizations used issue ads for the purpose of influencing federal elections. Judge Kollar-Kotelly found "uncontroverted" evidence "that by the early 1990s and especially by 1996, interest groups had developed a strategy to effectively communicate an electioneering message for or against a particular candidate without using the magic

words." *McConnell*, 251 F. Supp. 2d at 528 (internal quotation marks, alteration & citation omitted). Judge Leon likewise concluded that the "factual record unequivocally establishes that [issue ads] have not only been crafted for the specific purpose of directly affecting federal elections, but have been very successful in doing just that." *Id.* at 800.

6. The line that *Buckley* drew between express advocacy and issue advocacy—later imported into FECA Section 441b in *MCFL*—was not only easily and frequently circumvented but largely illusory from the start. *Buckley* foresaw as much:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest. [*Buckley*, 424 U.S. at 42.]

Indeed, this Court in *McConnell* confirmed that the express advocacy test is "functionally meaningless." 540 U.S. at 193, 217. "While the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *Id.* at 126.

Experience in fact powerfully demonstrated that the express advocacy test and the focus on "magic words" failed to identify accurately communications designed to influence federal elections. As Dr. Mann explained in his report, "research by political scientists confirmed the suspicion" that there is "little difference in purpose and content between express advocacy and candidate-specific issue advocacy communications financed by parties and groups." Mann Report 24. He explained that the "evidence of the explicit electioneering purpose of candidate-specific issue advocacy near the election was overwhelming" as such ads "run by parties and groups were largely indistinguishable from the campaign ads of the candidates." *Id.* As Dr. Mann found:

> Very few candidate ads used words of express advocacy; virtually all party issue ads mentioned the name of a federal candidate, mostly in attack mode, but few mentioned the name of the party; and almost every issue ad featuring the name of the candidate and running near an election was clearly designed to support or attack a candidate, not to express a view on an issue. [*Id.*]

The result: "Voters were unable to differentiate candidate-specific issue ads * * * sponsored by parties and outside groups from campaign ads run by candidates." *Id.*

That the dichotomy between express advocacy and issue advocacy is a false one was further born out by the *McConnell* litigation. All three of the judges of the District Court agreed that few ads run by candidates, parties or interest groups rely on words of express advocacy. *See* 251 F. Supp. 2d at 303 (Henderson, J.); *id.* at 529 (Kollar-Kotelly, J.); *id.* at 874 (Leon, J.); *see also McConnell*, 540 U.S. at 128 n.18. The record before them confirmed that media professionals actually disfavored such heavy-handed tactics. As one political consultant explained, given "the modern world of 30 second political advertisements," it "is rarely advisable" to use "such clumsy words as 'vote for' or 'vote against.' " *Id.* at 529-530 (Kollar-Kotelly, J.); *see also id.* at 305 (Henderson, J.); *id.* at 874-875 (Leon, J.). Rather, the "most effective" course, as "[a]ll advertising professionals understand," is to "lead[ ] the viewer to his or her own conclusion without forcing it down their throat." *Id.* at 529-530 (Kollar-Kotelly, J.); *id.* at 875 (Leon, J.); *see also McConnell*, 540 U.S. at 193 n.77 (noting that "political professionals and academics confirm that the use of magic words has become an anachronism"). "This is especially true of political advertising, because people are generally very skeptical of claims made by or about politicians." *McConnell*, 251 F. Supp. 2d at 530 (Kollar-Kotelly, J.). The express advocacy limitation of course proved no substantial obstacle for this "modern" electioneering approach.

Members of Congress themselves some of them "seasoned professionals who have been deeply involved in

elective processes and who have viewed them at close range over many years"[4]—confirmed that the "magic words" of express advocacy "do not distinguish pure issue advertisements from candidate-centered issue advertisements." *Id.* at 532 (Kollar-Kotelly, J.). Senator Feingold, for example, opined that "[p]eople didn't need to hear the so-called magic words to know what these ads were really all about." 147 Cong. Rec. S3072 (daily ed. Mar. 29, 2001), while Senator McCain explained that "th[is] Court's definition of 'express advocacy'—magic words—has no real bearing in today's world of campaign ads." 147 Cong. Rec. S3036 (daily ed. Mar. 28, 2001); *see also* 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) ("[E]ven a casual observer would concede that 'magic words' is a dramatically underinclusive test for determining what constitutes a campaign ad."). Many other federal lawmakers expressed similar views on so-called issue advocacy.[5]

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[4] *Buckley*, 424 U.S. at 261 (White, J., concurring in part & dissenting in part); *see also Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 650 (1996) (Stevens, J., dissenting) ("Congress surely has both wisdom and experience in these matters that is far superior to ours.").

[5] *See, e.g.*, 148 Cong. Rec. H387 (daily ed. Feb. 14, 2002) (statement of Rep. Cardin) ("Currently, these [issue] ads which are clearly aimed at influencing an election can be worded in a way that they are deemed issue advocacy and are not subject to campaign spending limits or disclosure requirements."); 148 Cong. Rec. H410 (daily ed. Feb. 14, 2002) (statement of Rep. Kleczka) ("An equally troubling aspect of today's campaign system is the number of issue advertisements broadcast on the television and radio. Although these ads technically adhere to federal campaign regulations, they violate the spirit of the law."); 147 Cong. Rec. S2636 (daily ed. Mar. 21, 2001) (statement of Sen. Edwards) ("In fact, [issue advertisements] are more than a masquerade, they are a sham, they are a fraud on the American people, and they are nothing but a means to avoid the legitimate election laws of this country."); 144 Cong. Rec. H6802 (daily ed. July 30, 1998) (statement of Rep. Shays) ("They are not sham in the sense that they do not have a right to speak, but they are not issue ads, they are campaign ads, and we call them such."); 144 Cong. Rec. S1038-39 (daily ed. Feb. 26, 1998) (statement of Sen. Bryan) ("Independent expenditure ads are one of the very reasons the

7. The widespread practice of using soft money to fund issue ads designed to influence federal elections was further documented in the six-volume report—spanning nearly 10,000 pages—that the Senate Governmental Affairs Committee (Committee), chaired by Senator Fred Thompson and led also by Ranking Member John Glenn, produced following its investigation into campaign finance law abuses during the 1996 presidential campaigns. *See Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, S. Rep. No. 105-167 (1998) (Thompson Report). This Court has characterized the Committee's findings as "disturbing." *McConnell*, 540 U.S. at 122.

The Committee concluded that issue ads constituted "the second most significant loophole" in the pre-existing campaign finance regime. Thompson Report at 5968 (minority views). The Committee "found such ads highly problematic for two reasons." *McConnell*, 540 U.S. at 131. First, because issue ads "accomplished the same purpose as express advocacy (which could lawfully be funded only with hard money), the ads enabled unions, corporations, and wealthy contributors to circumvent protections that FECA was intended to provide." *Id.* Second, while the ads were "ostensibly independent of the candidates," they were "often actually coordinated with, and controlled by, the campaigns." *Id.* "The ads thus provided a means for evading FECA's

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campaign system is out of control. We all know that these ads are really intended to defeat a candidate and are often coordinated with the opposition campaign. Simply put, these ads are not genuinely independent nor are they strictly concerned with issue advocacy."). 143 Cong. Rec. S10125 (daily ed. Sept. 29, 1997) (statement of Sen. Collins) ("[T]he situation I have described [regarding 'issue' ads run by the AFL-CIO] has led to the biggest sham in American politics. Nobody in Maine believed that the AFL[-]CIO's negative ads were for any purpose other than the defeat of a candidate. Ads of that nature make an absolute mockery out of the prohibition against unions and corporations spending money on Federal elections. The 'express advocacy' provision in McCain-Feingold is designed to do away with this sham.").

candidate contribution limits." *Id.* The Committee's findings bear out these conclusions.

Looking broadly at the problem posed by issue advocacy, the Thompson Report found that both national parties used soft money to fund issue ads intended to influence the 1996 presidential election. The Democratic National Committee (DNC) spent $44 million on issue ads during the 1996 presidential election, while the Republican National Committee (RNC) spent $24 million. *See* Thompson Report at 4482; *id.* at 8294 (minority views). When Harold Ickes, President Clinton's Deputy Chief of Staff, was asked during the Committee hearings whether the average person would comprehend the DNC and RNC's issue ads as encouraging a vote for one of the presidential candidates, he responded that "I would certainly hope so. If not, we ought to fire the ad agencies." *Id.* at 8286 (minority views).

The 1996 presidential candidates themselves tended to share this view toward issue ads funded by soft money. That President Clinton fully appreciated the impact of issue ads on his campaign for a second presidential term is apparent in his telling major contributors to the DNC that their contributions, which funded ads "run * * * through the Democratic party," rather than his campaign, "have made a huge difference." *Id.* at 62. Senator Dole's campaign deployed this strategy as well. The Report concluded that "there can be little doubt that the RNC's issue ads were intended to influence the outcome of a federal election." *Id.* at 4014. One of those advertisements, entitled "The Story," the Thompson Report concluded, "was nothing more than a biography of Bob Dole." *Id.* Senator Dole's campaign manager, Scott Reed, acknowledged that "[w]e went out in April and May and raised $25 million for the party, of which about $17, $18 or $19 million was put into party building ads, which were Bob Dole in nature." *Id.* at 8301 (minority views). In an interview with Ted Koppel of ABC News, Senator Dole explained that, while his campaign could not afford to fund ads lauding his candidacy, the RNC ran "generic" ads on his behalf. *Id.* at 4153-54. Questioned whether "Bob Dole for

President" constitutes "generic spending," Senator Dole explained that such generic ads "never say[ ] that I'm running for president, though I hope that it's fairly obvious, since I'm the only one in the picture!" *Id.* at 4154.

The Thompson Report further detailed the extent to which the national parties coordinated their issue ads with the campaigns of their presidential candidates. As for the DNC, the report concluded that the White House essentially "operated the [DNC] party apparatus as a slush-fund for the President's re-election campaign." *Id.* at 23. The Clinton/Gore campaign and the DNC used the same consultants, pollsters and media producers, *id.* at 34, and even coordinated the day on which their respective ads would run, *id.* at 118. Indeed, Dick Morris, a campaign advisor to President Clinton, stated that the President himself was so involved in the creation of all of the DNC and Clinton/Gore campaign ads that they essentially " 'became * * * the work of the President himself.' " *Id.* at 122. This "unprecedented" level of coordination led to the "oblitera[tion]" of any "distinctions remaining between the White House, the DNC, and [the] Clinton/Gore [campaign]." *Id.* at 107.

Similar findings were made in regard to the RNC and Senator Dole's campaign. The RNC's media campaign was controlled by Senator Dole's "campaign manager, chief fundraiser, media consultant, and pollster." *Id.* at 8297 (minority views). And "the criterion used by the RNC and the Dole campaign for deciding where to run issue ads was whether the ads would help Senator Dole win electoral votes." *Id.* at 8299 (minority views).

The Thompson Report further concluded that, just as the national parties exploited the issue-advocacy loophole, so, too, did corporations and unions. It found that such organizations spent "roughly one-seventh of the 400 million dollars expended on political advertising during the 1996 elections by parties, candidates and others." *Id.* at 3993. These ads — like the ones produced by the parties — were likewise intended to influence federal elections. *See id.* at 3997. They were indeed often coordinated with the campaigns of the

1996 presidential candidates or the national parties with which they were associated. *Id.* The Thompson Report found, for example, that "[e]vidence * * * indicates [that AFL-CIO] programs were conceived, designed and implemented to defeat Republican Members of Congress during the 1996 elections." *Id.*; *see also id.* at 49 ("White House aides and the AFL-CIO carefully reviewed each other's advertisements and coordinated their timing and placement."). Dick Morris additionally testified during the Committee hearings that an August 1995 meeting between representatives of the Clinton/Gore campaign, the DNC and seven labor organizations constituted " 'a full briefing of us by them on their media plans.' " *Id.* at 128.

Groups backing Republican candidates similarly used issue ads in an attempt to influence federal elections. For instance, The Coalition: Americans Working for Real Change, a group formed to counter issue ads aired by the AFL-CIO, produced issue ads nearly identical to those run by the National Republican Congressional Committee (NRCC), a division of the RNC, aired them at the same time as the NRCC's ads and "in districts where the Republican incumbent's seat was vulnerable." *Id.* at 8944 (minority views). Another group, Triad Management Services, "channeled millions of dollars from its backers to two tax-exempt groups it had established for the sole purpose of running attack ads against Democratic candidates under the guise of 'issue advocacy.' " *Id.* at 4569 (minority views). "By operating this way, Triad and its financial backers avoided the disclosure and campaign contribution limits of the federal election laws." *Id.* They became "surrogates" by which the RNC "was able to circumvent federal campaign finance laws." *Id.* at 5979 (minority views). This was so because whereas "a political party [that] broadcasts issue ads * * * is required to pay for them with a combination of hard dollars and soft dollars," when "an outside group runs such ads, there are no such restrictions—even if the funding comes from the RNC." *Id.*

The Thompson Report concluded that repairs to the campaign finance laws must involve restrictions on issue advocacy. "The majority expressed the view that a ban on the raising of soft money by national party committees would effectively address the use of union and corporate general treasury funds in the federal political process only if it required that candidate-specific ads be funded with hard money." *McConnell*, 540 U.S. at 132; *see also* Thompson Report at 4492. The minority similarly recommended "reforms addressing candidate advertisements masquerading as issue ads." Thompson Report at 9394 (minority views); *see also McConnell*, 540 U.S. at 132.

8. "*Buckley*'s express advocacy line [did] not aid[ ] the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 193-194. The legislative process culminating in the passage of BCRA spanned more than six years and generated multiple reform bills introduced in Congress. *See McConnell*, 251 F. Supp. 2d at 434 (noting that "the legislative process took over six years of study and reflection by Congress") (Kollar-Kotelly); *id.* at 434 n.1 (listing campaign finance bills introduced in Congress during six-year period preceding BCRA's passage). This process was influenced by the failings of the pre-BCRA campaign finance regime brought to light by the Thompson Report as well as the reforms that the report proposed.[6] Senator Feingold, for example, opined that, "in the wake of the Thompson investigation, we reluctantly concluded that we need to first focus our efforts on closing the biggest loopholes in the system: the soft money and the phony issue ads." 148 Cong. Rec. S2104 (daily ed. Mar. 20, 2002). Senator Glenn similarly noted that the Thompson Report

[6] The House and Senate bills that ultimately became BCRA were not accompanied by the customary explanatory committee reports. Members of Congress frequently relied on the Thompson Report's findings in floor debates on BCRA, however. *See, e.g.*, 147 Cong. Rec. S3138 (daily ed. Mar. 29, 2001) (statement of Sen. Levin) ("The 1997 Senate investigation collected ample evidence of campaign abuses.").

"showed that the legal distinction between 'issue ads' and 'candidate ads' has proved to be largely meaningless" and that the legislation under consideration "goes a long way to address[ing] th[is] abuse." 144 Cong. Rec. S1048-49 (daily ed. Feb. 26, 1998).

9. BCRA Section 203 directly combats the well documented problem of issue ads that avoided express advocacy but nevertheless had the purpose and likely effect of influencing federal elections. That section extended FECA's preexisting prohibition on the use of corporate and union general treasury funds to finance communications influencing federal elections—which *MCFL* previously had limited to communications expressly advocating election or defeat of a particular candidate—to cover any "electioneering communication." 2 U.S.C. § 441b(b)(2). An electioneering communication is defined as (1) any "broadcast, cable or satellite communication" that (2) "refers to a clearly identified candidate for Federal office"; (3) is made within either 60 days preceding a federal general election, or 30 days preceding a federal primary election, for the office the candidate seeks; and (4) is "targeted to the relevant electorate," 2 U.S.C. § 434(f)(3)(A)(i), meaning that the communication must be received by 50,000 or more persons in the "relevant congressional district or state." *McConnell*, 251 F. Supp. 2d at 212 (per curiam). "Thus, under BCRA, corporations and unions may not use their general treasury funds to finance electioneering communications, but they remain free to organize and administer segregated funds, or PACs, for that purpose." *McConnell*, 540 U.S. at 204.

Congress's new term—"electioneering communication"—is carefully calculated to identify (and block) corporate and union general treasury expenditures on broadcast advertisements intended to influence federal elections that escaped detection under *Buckley*'s express advocacy radar. "By adopting a definition of electioneering communication that by and large is premised on the empirical determinants that Congress found distinguish pure issue advocacy from candidate-centered issue advocacy," as Judge Kollar-Kotelly

explained, Congress "rejected reliance on the subjective impressions of the listener and focuses on objective variables that do an impressive job * * * of distinguishing between candidate-centered issue advertising and pure issue advertising." *McConnell*, 251 F. Supp. 2d at 569. She found that

> the uncontroverted record establishes that pure issue advocacy is empirically distinguishable from candidate-centered issue advocacy on the basis of (a) whether the federal candidate is named; (b) whether the advertisement is run in close proximity to a federal election; and (c) if the advertisement is run in a competitive race. [*Id.* at 567.]

Each criterion of Congress's new term is bottomed on empirical evidence. *First*, the definition of electioneering communication aims only at the media "found by Congress to be problematic." *Id.* at 569. "The records developed in [the BCRA pre-enforcement] litigation and by the Senate Committee adequately explain the reasons for this legislative choice." *McConnell*, 540 U.S. at 207. As Judge Kollar-Kotelly explained, that record "demonstrate[d] that more than any other medium, broadcast advertisements were the vehicle through which corporations and labor unions spent their general treasury funds to influence federal elections." *McConnell*, 251 F. Supp. 2d at 573. The Thompson Report further supported Congress's finding that "corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections." *McConnell*, 540 U.S. at 207. *See* Thompson Report at 4465, 4474-81; *id.* at 7521-25 (minority views).

Second, the definition of electioneering communication encompasses only messages that refer to clearly identified candidates for federal elected office. During the pre-enforcement challenge, "[f]ederal officeholders and candidates * * * testif[ied] that, based on their experience, the intent behind issue advertisements that mention the name of a federal candidate, are aired right before the election, and broadcast to the candidate's electorate, is to influence the

election." *McConnell*, 251 F. Supp. 2d at 534 (Kollar-Kotelly). These politicians' intuitions were confirmed by political consultants' "uncontroverted testimony that when designing pure issue advertisements, it was never necessary to reference specific candidates for federal office in order to create effective ads." *Id.* at 628 (internal quotation marks & ellipsis omitted). As Judge Kollar-Kotelly explained, moreover, the rather obvious "flip side of this coin * * * is that when advertisements do mention a candidate's name, particularly in the period preceding an election, the advertisement's primary purpose is usually to influence the election." *Id.*

Third, the 30- and 60-day pre-election blackout periods applicable to electioneering communications also strongly correlate to the periods during which ads aimed at influencing federal elections are most likely to air—the time period, not surprisingly, immediately preceding an election. Judge Kollar-Kotelly concluded that "[t]he uncontroverted testimony of experts confirms that the airing of issue advertisements designed to influence a federal election is at its zenith in the final weeks prior to an election." *Id.* at 564-565; *see also id.* at 630. Her opinion includes a graph showing that the number of issue ads rises as an election day nears and dramatically spikes in the weeks immediately preceding an election. *Id.* at 564. As one media consultant testified: "In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections." *Id.* at 561. This consultant confirmed the common-sense proposition that, "[f]rom a media consultant's perspective, there would be no reason to run such ads if your desire was not to impact an election." *Id.* And, in *McConnell*, this Court similarly concluded that, although "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief [30 and 60 day] preelection time spans but had no electioneering purpose is a matter of dispute * * * the *vast majority* of such ads clearly had such a purpose." 540 U.S. at 206 (emphasis added) (citations omitted).

Fourth, the definition of electioneering communication is keyed to messages that are targeted to the electorate relevant to the candidate to which the message refers. This component of the definition accounts for the fact that messages that "target substantial portions of the electorate who decide a candidate's political future are those most likely to influence an election, and earn the candidate's gratitude." *McConnell*, 251 F. Supp. 2d at 633 (Kollar-Kotelly). Officeholders and candidates confirmed that issue ads delivered to a candidate's electorate were intended to influence the election. *Id.* at 534.

Acknowledging that "Congress' careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference," *McConnell*, 540 U.S. at 117 (internal quotation marks & citations omitted), this Court upheld Congress's corrective measure embodied in BCRA Section 203, and BCRA's primary definition of "electioneering communication" on which it relies, against a facial constitutional attack in *McConnell*, *see id.* at 189-194, 203-209.

The deference that this Court in *McConnell* showed Congress is especially appropriate "in [this] area where it enjoys particular expertise." *Id.* at 185 n.72. In this case, the Court owes "no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (internal quotation marks omitted).

II. THE LOWER COURT'S REVIEW DEPARTS FROM THIS COURT'S PRECEDENTS AND THREATENS TO RE-OPEN THE LOOPHOLE CLOSED BY BCRA SECTION 203.

The District Court traveled a misguided course in holding Section 203 unconstitutional as applied to WRTL's anti-filibuster ads—a course charted on a misapprehension of its role and in reaction to groundless fears, and one that, in the end, led it far astray from *McConnell*'s well-lighted path.

1. The District Court fundamentally misunderstood the task at hand. Even after the parties conducted discovery (ordered by the court) and proposed findings of fact, *see* J.S. App. at 9a-10a, it considered only the "language within the four corners of the anti-filibuster ads," *id.* at 22a, to find the statute unconstitutional on the belief that "[d]etermining [the] intent and the likely effect" of the advertisements is "too conjectural and wholly impractical," *id.* at 18a. But an as-applied constitutional challenge calls for a far more searching—and fact-intensive—review. *See United States* v. *Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 565 (1972) (as-applied challenge involves determining whether "the section, by its own terms, infringed constitutional freedoms in the circumstances of the particular case"); *see also Members of the City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 798 (1984) (stating "general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court"). That mode of review "requires an analysis of the *facts of a particular case* to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right." *Field Day, LLC* v. *County of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006) (emphasis added); *see also Faustin* v. *City & County of Denver*, 423 F.3d 1192, 1196 (10th Cir. 2005) ("[A]n as-applied challenge tests the application of th[e] restriction to the facts of a plaintiff's concrete case."); *Sanjour* v. *EPA*, 56 F.3d 85, 92 n.10 (D.C. Cir. 1995) (en banc) (noting as-applied challenge "ask[s] only that the reviewing court declare the challenged statute or regulation unconstitutional on the facts of the particular case"). The District Court's contrary approach rendered as-applied review a less precise tool for assessing the constitutionality of an Act of Congress in a particular case by "formulat[ing] a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *United States* v. *Raines*, 362 U.S. 17, 21 (1960).

2. Moreover, the District Court adopted its "four corners" review on a premise that this Court's jurisprudence rejects. It

believed that it had to restrict its review to the face of WRTL's ads because "the judiciary * * * should not be in the business of trying to read any speaker's mind" and likewise should not "be charged with conjuring the subjective intent of the speaker." J.S. App. at 21a-22a. But "[t]he law does not refrain from searching for the intent of the actor in a multitude of circumstances." *Bush* v. *Gore*, 531 U.S. 98, 106 (2000); *see also City of Indianapolis* v. *Edmond*, 531 U.S. 32, 46-47 (2000) ("While we recognize the challenges inherent in a purpose inquiry, courts routinely engage in this enterprise in many areas of constitutional jurisprudence * * *.").

As this Court has explained, "[i]t is common in the law to examine the content of a communication *to determine the speaker's purpose*." *Hill* v. *Colorado*, 530 U.S. 703, 721 (2000) (emphasis added); *see, e.g.*, *Connick* v. *Myers*, 461 U.S. 138, 147-148 (1983) ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.").

The Court has long considered a speaker's intent, for example, when assessing whether symbolic conduct receives First Amendment protection. *See, e.g.*, *Texas* v. *Johnson*, 491 U.S. 397, 404 (1989) (determining "whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play" requires consideration of "an intent to convey a particularized message") (internal quotation marks & alteration omitted); *Spence* v. *Washington*, 418 U.S. 405, 410-411 (1974). And, in other circumstances, this Court requires consideration of a speaker's intent before his speech may trigger legal liability. *see, e.g.*, *Time, Inc.* v. *Hill*, 385 U.S. 374, 387-388 (1967) ("We hold that the constitutional protections for speech and press preclude the application of the New York [right to privacy] statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."); *New York Times* v. *Sullivan*, 376 U.S. 254, 279-280

(1964) (holding that a public official may not recover damages "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' "), or provide grounds for termination from public employment, *see, e.g.*, *Pickering* v. *Board of Educ.*, 391 U.S. 563, 574 (1968) ("[A]bsent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.").

3. Even more troubling than the District Court's adoption of a "four corners" test based on misplaced concerns is that, in doing so, it ignored *McConnell*'s clear contrary instruction to consider the intent and effect of political ads. There, the Court rejected the plaintiffs' argument that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications" because they "apply equally to ads aired during th[e blackout] periods if the ads are *intended* to influence the voters' decisions and have that *effect*." *McConnell*, 540 U.S. at 206 (emphases added). Such ads, it concluded, are the "functional equivalent of express advocacy." *Id.* And, while the Court declined to identify the precise percentage of issue ads that had an electioneering purpose, it concluded that "[t]he vast majority of ads clearly had such a *purpose*." *Id.* (emphasis added).

McConnell's conclusion that issue ads are tantamount to express advocacy—and permissibly regulated—"if the ads are *intended* to influence the voters' decisions and have that *effect*" makes clear that review of an as-applied challenge to Section 203 requires assessing whether the ads in question are *intended* to influence voters and have that *effect* in view of their context as well as content. By reviewing only whether the "language within the four corners" of the ads met a set of linguistic criteria different from Section 203's objective criteria the District Court ignored the "unmistakable lesson" of *McConnell*: The "presence or absence of magic words cannot meaningfully distinguish electioneering

speech from a true issue ad."[7] The District Court announced a new set of "magic words" instead. *Id.* at 193.

4. If the District Court's approach to as-applied challenges to Section 203 stands, it threatens to re-open the express advocacy loophole that unions and corporations exploited until Congress closed it with that provision. As this Court knows, "[i]f the history of campaign finance regulation * * * proves anything, it is that political parties are extraordinarily flexible in adapting to new restrictions on their fundraising abilities." *McConnell*, 540 U.S. at 173.

Congress put an end to the ability of corporations and labor unions to use their treasury funds to influence federal elections by replacing the "functionally meaningless" express advocacy test with objective, empirically-based factors that identify ads intended to influence elections. *Id.* at 193. Yet, if BCRA Section 203 cannot constitutionally apply to ads that meet Congress's objective standards, but do not, on their face, meet the District Court's different criteria, then actors in the political arena will no doubt "test the limits" of the new "four corners" rule with ads designed to influence federal elections. *Beaumont*, 539 U.S. at 155.

To prevent a new wave of ads designed to circumvent the campaign finance laws, and halt a return to the days of high formalism and magic words, the review of as-applied challenges to BCRA Section 203 should focus not just on the "language within the four corners" of the ads but also, as *McConnell* requires, on the intent and effect of the ads.

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[7] In fact, the District Court actually invoked *Buckley*'s rationale for adopting the magic words requirement to support its limited review, despite *McConnell*'s clear holding that *Buckley*'s "express advocacy restriction was an endpoint of statutory construction, not a first principle of constitutional law." 540 U.S. at 190.

III. WRTL'S ADS ARE THE VERY TYPE OF COMMUNICATIONS BCRA SECTION 203 IS DESIGNED TO PROHIBIT.

Before the District Court restricted itself to the "language within the four corners" of WRTL's ads, it found that the ads "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." J.S. App. at 62a. That conclusion—formed long before it reviewed the merits of WRTL's challenge—remains correct.

1. The context, timing, and content of WRTL's ads reveal that they are designed to "convey [a] message" opposing a candidate for federal office—namely, Senator Feingold. *McConnell*, 540 U.S. at 239. As for context, WRTL's "role in the political environment" first points to the ads' purpose. J.S. App. at 41a (Roberts, J., dissenting). WRTL spent more than $60,000 in independent expenditures to oppose Senator Feingold's reelection, and issued a news release critical of his record on the judicial filibuster issue. *Id.* at 41a-42a. WRTL's PAC also announced that Senator Feingold's defeat was a priority and, toward that end, endorsed three candidates running against him. *Id.*

2. The timing of the ads—which both Congress and this Court recognized is a key determinant for identifying ads intended to influence an election—also signals that WRTL's ads were intended to influence Senator Feingold's reelection effort and, if aired, would have had that effect. Despite using other, non-broadcast media to convey its anti-judicial-filibuster message, WRTL only turned to the broadcast media (and its ads playing on the needless-delay theme) in the run up to the BCRA pre-election blackout period before the election. *See id.* at 5a, 9a. Moreover, the notion that these ads were intended to influence cloture votes on judicial filibusters—rather than Senator Feingold's run for office—is gainsaid by the fact the ads only began to air *after* the cloture votes had taken place and when Congress was out of session on a six-week recess. *Id.* at 43a (Roberts, J., dissenting). WRTL did not even run its ads after the 2004 election "in

either 2004 or in 2005 during the height of the [judicial filibuster] controversy." *Id.* (citation omitted).

3. The content of the ads themselves further indicates that they were intended to impact Senator Feingold's re-election. All of the ads that WRTL sought to air during BCRA's blackout period connect Senator Feingold to a "group of U.S. Senators * * * blocking qualified [judicial] nominees from a simple 'yes' or 'no' vote" by encouraging the listener (or, in the case of the "Waiting" advertisement, viewer) to contact Senator Feingold and tell him "to oppose the filibuster." *Id.* at 70a; *see also id.* at 67a, 69a. Indeed, while the ads offer the listener or viewer no way to contact Senator Feingold, they direct the listener or viewer to a website that "explicitly attacked Feingold's record and encouraged website readers to defeat him." *Id.* at 42a.

In sum, "[t]he notion that th[ese] advertisement[s] w[ere] designed purely to discuss the issue of [judicial filibusters] strains credulity." *McConnell*, 540 U.S. at 194 n.78.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
PAUL A. WERNER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

FEBRUARY 2007 *Counsel for Amici Curiae*

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In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Appellant*
v.
WISCONSIN RIGHT TO LIFE, *Appellee*

SENATOR JOHN MCCAIN ET AL., *Intervenor-Appellants*
v.
WISCONSIN RIGHT TO LIFE, *Appellee*

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF FAMILY RESEARCH COUNCIL, FREE MARKET FOUNDATION, AND HOME SCHOOL LEGAL DEFENSE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

STEPHEN W. REED
MATTHEW A. REED
REED & BROWN, LLP
35 North Lake Avenue
Suite 960
Pasadena, CA 91101
(626) 449-4521

KATHLEEN M. SULLIVAN
Counsel of Record
DEREK L. SHAFFER
STANFORD CONSTITUTIONAL LAW CENTER
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 725-9875
Counsel for Amici Curiae

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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MISCELLANEOUS

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148 Cong. Rec. S8,155 (daily ed. Sept. 4, 2002).....7
Federal Election Commission, Electioneering Communications Reports, http://www.fec.gov/finance/disclosure/ec_table.shtml.....10
Federal Election Commission, FEC Disclosure Reports Advanced Search, http://www.fec.gov/finance/disclosure/adv-search.shtml..11
Google.org Home Page, http://www.google.org/.....10
Carl Hulse, *As Deadline Nears, Congress Slogs in a Fiscal Quagmire*, N.Y. Times, Sept. 5, 2002, at A19.....7
Bringing Radio Advertising to Google Advertisers: An Update, Inside Adwords, Dec. 17, 2006, http://adwords.blogspot.com/2006/12/bringing-radio-advertising-to-google.html 8
Internal Revenue Service, *Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations* (FS-2006-17) (2006).....13

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I.R.S. Tech. Adv. Mem. 200446033 (Nov. 12, 2004).....13
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Library of Congress, Thomas, Advanced Bill Summary & Status Search for the 108th Congress, http://thomas.loc.gov/bss/d108query.html.....7
Madeline Stanionis, *When Only an Online Appeal Will Do*, Mal Warwick Assoc. E-Newsl. (Mal Warwick Assoc., Berkeley, Cal.), July 2003, http://www.malwarwick.com/learning-resources/e newsletters/jul03.html.....14-15
Target Corporation, Target Grants, http://sites.target.com/site/en/corporate/page.jsp?contentId=PRD03-004090.....9-10
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INTERESTS OF *AMICI CURIAE*[1]

The Family Research Council is a nonprofit, research and educational organization dedicated to advancing a family-centered philosophy of public life through policy research and outreach to the news media, the academic and business communities and the general public. As part of its educational activity, the Council frequently urges its constituents to contact their elected representatives to request that they vote in favor of or opposition to pending legislation on family and religious liberty issues of interest to the constituency.

The Free Market Foundation is a nonprofit, research and advocacy organization committed to protecting freedom in the marketplace and freedom in the exchange of ideas in a democratic republic. As a core aspect of its mission, the Foundation regularly engages in grassroots lobbying in support of these principles.

The Home School Legal Defense Association is a nonprofit advocacy organization that promotes families' freedom to homeschool their children. As an essential element of its mission, the Association engages in significant grassroots advocacy at both the state and federal levels. Such advocacy requires the ability to communicate with members whenever an issue arises, without regard to the proximity of federal elections.

Organizations like *Amici* have long been the lifeblood of the nation's democracy, enabling ordinary Americans to en-

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. In accordance with Rule 37.6, *Amici* state that this brief was not written in whole or in part by counsel for any party, and no persons other than *Amici* have made a monetary contribution to the preparation or submission of this brief.

gage in civic life and political speech. Tocqueville noted upon visiting the United States that "the most democratic country on earth is found to be, above all, the one where men . . . have most perfected the art of pursuing the object of their common desires in common." Alexis de Tocqueville, *Democracy in America* 490 (Harvey C. Mansfield & Delba Winthrop eds. 2000) (1840). He observed further that "freedom of association has become a necessary guarantee against the tyranny of the majority," *id.* at 183, and that, "[i]f men who live in democratic countries had neither the right nor the taste to unite in political goals, their independence would run great risks," *id.* at 490.

Amici believe that permitting the Government to restrict core political speech by nonprofit, citizen advocacy organizations during fixed pre-election time periods gravely undermines political liberty and democracy:

> [A]ctive liberty is particularly at risk when law restricts speech directly related to the shaping of public opinion, for example, speech that takes place in areas related to politics and policy-making by elected officials. That special risk justifies especially strong pro-speech judicial presumptions. It also justifies careful review whenever the speech in question seeks to shape public opinion, particularly if that opinion in turn will affect the political process and the kind of society in which we live.

Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 42 (2005).

Amici have been chilled in their grassroots advocacy during periods preceding elections for fear of running afoul of the legal provisions challenged in this case. Indeed, one *Amicus*, the Family Research Council, has specifically curtailed pre-election broadcast advertising in which it previously had engaged. *Amici* respectfully urge the Court to affirm the judgment below.

SUMMARY OF ARGUMENT

Appellants suggest that the prohibition in Section 203 of the Bipartisan Campaign Reform Act ("BCRA") against corporate "electioneering communications" is something other than a ban on core political speech warranting strict scrutiny under the First Amendment. *Amici* respectfully submit that this is incorrect. As experience since this Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), demonstrates, BCRA effectively forecloses *Amici* and other small, nonprofit, grassroots advocacy groups altogether from running pre-election broadcast issue ads. The *MCFL* exception is so grudgingly administered by the FEC that virtually no group engaged in "electioneering communications" qualifies for this exception in practice. Political action committees ("PACs") are unavailable to § 501(c)(3) corporations as a matter of law, and are so costly and difficult to maintain that only large, sophisticated corporations can employ them. And while as-applied challenges remain available in theory, they have proved, as in this case, to be protracted battles that cannot be won until long after the relevant election.

Contrary to Appellants' arguments, the "electioneering communications" provision cannot satisfy strict scrutiny, at least with respect to nonprofit, grassroots advocacy groups like Appellee and *Amici*. To begin with, there is no compelling interest to support it. Speech by nonprofit advocacy groups on behalf of their members does not "corrupt" candidates or "distort" the political marketplace. Instead, it is Section 203 that distorts, leaving wealthy individuals and corporate media conglomerates unfettered in their pre-election broadcast advocacy, and inducing sophisticated corporations to turn to alternatives such as PACs, while thwarting speech by individuals of moderate means who have banded together in grassroots groups to express their views.

But even if Section 203 did serve some compelling interest, it still would not be adequately tailored to achieving

it. Nonprofit advocacy groups funded by individuals are readily distinguished from for-profit corporations funded by general treasuries. Indeed, Section 203 as passed by Congress initially contained a less restrictive alternative that would have reached only the latter: BCRA's original "Snowe-Jeffords exception" would have permitted nonprofit groups to fund electioneering communications with contributions from individual supporters. Yet Congress eliminated that exception by enacting the "Wellstone Amendment." *Amici* respectfully submit that this Court should now hold that provision unconstitutional, severing it from BCRA, restoring the less restrictive Snowe-Jeffords exception, and giving grassroots advocacy at election time the breathing room the First Amendment requires.

ARGUMENT

I. SECTION 203 OPERATES IN PRACTICE AS AN EFFECTIVE BAN ON GRASSROOTS ADVOCACY BY MANY NONPROFIT GROUPS IN KEY MEDIA DURING KEY PERIODS OF LEGISLATIVE ACTIVITY

Section 203 of BCRA prohibits any mention of a federal candidate in a broadcast advertisement during specified preelection "blackout" periods—even by nonprofit, grassroots advocacy groups that are vital contributors to the nation's political discourse.[2] In upholding § 203 against facial chal-

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[2] Section 203 of BCRA prohibits corporations and labor unions from funding "electioneering communications." 2 U.S.C. § 441b(a) (2000). Section 201 defines "electioneering communications" as "any broadcast, cable, or satellite communication which (I) refers to a clearly identified candidate for Federal office; (II) is made within (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a

lenge, this Court downplayed its adverse effects on grassroots democracy, characterizing it as a mere burden, not a ban, that simply displaces core political speech into other time periods or other vehicles such as PACs. *See McConnell v. FEC*, 540 U.S. 93, 204 (2003). The FEC and the Intervenors similarly downplay the practical force of § 203 in limiting grassroots democracy. *See, e.g.*, Brief of Intervenor-Appellants ("Int. Br.") at 29, *Senator John McCain et al. v. Wisconsin Right to Life*, No. 06-970 (2007).

The practical reality since *McConnell* demonstrates otherwise. In fact, for many nonprofit advocacy organizations like *Amici*, pre-election blackouts on "electioneering communications" are tantamount to a ban on core political speech, disabling grassroots issue advocacy at precisely the times when it might be most pressing. Under § 203, for example, grassroots nonprofits like *Amici* would be unable to broadcast messages informing listeners of their Representative's position on a particular legislative proposal—even one as significant as a possible constitutional amendment regarding marital status or a statutory ban on late-term abortion—simply because incumbent officeholders chose to introduce it after the blackout period had begun.

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communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate." 2 U.S.C. § 434(f)(3) (Supp. IV 2004).

Section 203(b) of BCRA would have exempted electioneering communications by nonprofit advocacy groups incorporated under § 501(c)(4) and § 527(e)(1) of the Internal Revenue Code so long as they were "paid for exclusively by funds provided directly by individuals." 2 U.S.C. § 441b(c)(2). But that exemption was designedly negated by § 204 of BCRA, which withdraws the exception for § 501(c)(4) and § 527(e)(1) corporations in the case of expenditures for "targeted communications"—which, by definition, include *all* "electioneering communications." *See* 2 U.S.C. § 441b(c)(6)(A) (Supp. IV 2004).

None of the exceptions or alternatives that § 203 supposedly leaves open in fact suffices, as a practical matter, to give relief from this effective ban on core grassroots advocacy. First, while the FEC has interpreted this Court's decision in *FEC v. Massachusetts Citizens for Life, Inc.* ("MCFL"), 479 U.S. 238 (1986), to require § 203 exemptions for *some* grassroots organizations, such exceptions are, under current FEC practice, unavailable to the overwhelming majority of grassroots advocacy groups. Second, while this Court has suggested that PACs might provide an alternative vehicle for issue advocacy, the daunting legal, financial and administrative difficulties of forming a PAC are prohibitive for most small grassroots advocacy groups. Third, as WRTL's own experience in this case demonstrates, as-applied judicial challenges have proved ineffective in protecting grassroots broadcasts in the relatively short time periods before their political relevance evaporates. For these reasons, § 203 merits strict scrutiny under the First Amendment.

A. Section 203 Effectively Bans Grassroots Advocacy in Key Media During Key Time Periods

Section 203 imposes political broadcast blackouts of dizzying temporal and geographic scope. These blackouts in fact span much of the map during much of the political calendar by virtue of the timing of primary elections in the several States. For example, a primary election may be run in a single State but nonetheless force a blackout on a broadcast media market that overlaps state lines, depriving voters in adjacent states of broadcasts even outside the period preceding their own primary elections.

But even if the 60-day blackout period preceding the general election is considered on its own, it is clear that it blocks vital political advocacy by grassroots groups. The United States Congress, unlike the British Parliament and other legislatures, remains in session during the election sea-

son. Thus, the period preceding an election is a time in which legislative activity typically increases and incumbent legislators are more likely to listen to their constituents.

Within the 60 days preceding the 2004 general election, for example, there were 499 bills and resolutions introduced in the House of Representatives, *see* http://thomas.loc.gov/bss/d108query.html (select "Introduced in House" under "Stage in Legislative Process" for dates 9/2/2004 to 11/2/2004), which marked a 156% increase over the 320 introduced in the previous two-month period, *id.* (select "Introduced in House" under "Stage in Legislative Process" for dates 7/2/2004 to 9/2/2004). Six of these bills were proposed amendments to the Constitution; one, the "Marriage Protection Amendment," was both introduced and sent to a vote during the period.

Within the 60-day blackout period, the House and Senate in recent years have also debated such issues as impeachment of the President, *see* Authorizing the Committee on the Judiciary to Investigate Whether Sufficient Grounds Exist for the Impeachment of William Jefferson Clinton, President of the United States, 144 Cong. Rec. H10,096 (daily ed. Oct. 8, 1998); limitations on "partial birth" abortion, *see Votes in Congress*, N.Y. Times, Sept. 20, 1998, section 1, at 48; judicial nominations, *see Wisconsin Right to Life v. FEC*, 2004 WL 3622736, at *1 (D.D.C. 2004), *vacated*, 546 U.S. 410 (2006); creation of the Department of Homeland Security, *see* Homeland Security Act of 2002, 148 Cong. Rec. S8,155 (daily ed. Sept. 4, 2002); and appropriation bills, *see, e.g.*, Carl Hulse, *As Deadline Nears, Congress Slogs in a Fiscal Quagmire*, N.Y. Times, Sept. 5, 2002, at A19.

Thus, it is a fallacy to suppose that § 203 limits political speech in only a narrow or inconsequential window of time. Nor does § 203 limit the speech of only a narrow class of speakers. Some might suppose that the impact of § 203 is felt only by large, sophisticated corporations that can afford

to pay the extravagant costs associated with purchasing television airtime. To the contrary, however, § 203 sweeps within its prohibitions even inexpensive methods of grassroots advocacy by small nonprofit corporations supported by persons of ordinary income.

Prohibited "electioneering communications" include, for example, *radio* broadcasts that provide a cheaper, simpler alternative to television broadcasting.[3] Section 203 thus impairs a relatively inexpensive means for grassroots groups to communicate with the public in numerous markets. It also prevents grassroots organizations that do amass funds to run a single or limited number of television ads from targeting those scarce resources to the most relevant time period.

B. Few Grassroots Advocacy Groups Can Benefit in Practice from the FEC's *MCFL* Exception

Because this Court has long recognized that "[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status," *MCFL*, 479 U.S. at 263, the FEC has made theoretically available a so-called *MCFL* exception to the strictures of § 203. As administered on the ground, however, the *MCFL* exception has proved all but illusory. Only a scant few of the nonprofit, grassroots advocacy groups whose

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[3] For example, Google has an "Audio Ads" program through which organizations can upload radio ads and select target audience demographics; Google, in turn, bids out such ads to radio stations. *See Bringing Radio Advertising to Google Advertisers: An Update*, Inside Adwords, Dec. 7, 2006, http://adwords.blogspot.com/2006/12/bringing-radio-advertising-to-google.html. The cost of broadcasting a national 30-second radio ad through Google's bidding program is as low as $500 per week. *See* Troy Janish, *See How They Run: Radio Ads and Google*, Wisconsin Technology Network, Mar. 13, 2007, http://wistechnology.com/article.php?id=3768.

speech § 203 limits have obtained the exception, often only after great difficulty, delay and expense.

To begin with, the FEC's definition of an *MCFL* organization is narrower than that of this Court. MCFL itself was permitted to make independent expenditures because it "was formed for the express purpose of promoting political ideas," had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings," and "was not established by a business corporation or a labor union." *Id.*

The FEC, by contrast, requires "qualified nonprofit corporations" ("QNCs") to meet more stringent criteria in order to qualify for the *MCFL* exception. *See* 11 C.F.R. § 114.10 (2006). Corporations organized under § 501(c)(3) of the Internal Revenue Code are categorically disqualified. And in order be *MCFL*-exempt, a nonprofit must prove to the FEC that its "*only* express purpose is the promotion of political ideas," that it *never* "directly or indirectly accept[s] donations of anything of value from business corporations," and that its members receive *no* benefits that *might* provide a "disincentive for them to disassociate themselves with the corporation on the basis of the corporation's position on a political issue." *Id.* §§ 114.10 (c)(1)-(5) (2006) (emphasis added).

These procrustean requirements make it very difficult in practice for nonprofit corporations to obtain *MCFL* status from the FEC. Grassroots advocacy organizations like *Amici* may not run broadcast ads mentioning candidates during blackout periods if they have received a single dollar in corporate or labor contributions,[4] devoted themselves to ideo-

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[4] Acceptance of corporate contributions in relatively small amounts by nonprofit, grassroots groups is commonplace. For instance, the Ben & Jerry's ice cream company makes donations at its board's discretion of over $1.1 million annually to § 501(c)(3) and other nonprofit groups. *See* Ben & Jerry's Foundation Home Page, http://www.benjerry.com/foundation/. Hundreds of other corporations have similar giving programs. *See, e.g.*, Target Cor-

logical but apolitical purposes, extended a credit-card program to their members, or raised any money (for example, through bake sales, t-shirt sales, or paid advertising in newsletters) that was not specifically and expressly denominated as for a political purpose. *See* 11 C.F.R. § 114.10(b)(3)(ii).[5]

Not surprisingly, very few nonprofits ever qualify as *MCFL* organizations under these draconian rules. Since 2003, *only fourteen nonprofit groups* broadcasting political ads have qualified for the *MCFL* exception; most of these are organizations with a sizeable infrastructure like the League of Conservation Voters, the National Resources Defense Council, and Swift Boat Veterans for Truth.[6] Of the approximately 70 organizations filing with the FEC as *MCFL*-exempt, only about twenty were not affiliated with Planned Parenthood, and most of these had sizeable parent organiza-

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poration, Target Grants, http://sites.target.com/site/en/corporate/page.jsp?contentId=PRD03-004090 (noting that Target sets aside 5% of annual profits for distribution to § 501(c)(3) nonprofits through grants in $1000-$3000 amounts); Google.org, http://www.google.org (describing "Google Grants" program through which Google, Inc. has donated $33 million in advertising to § 501(c)(3) organizations).

[5] *See also* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,300 (July 6, 1995) (stating that "credit cards . . . will be considered disincentives to disassociate. Consequently, corporations that offer such things as affinity credit cards . . . will not be qualified nonprofit corporations"); *id.* at 35,298 (explaining that "a corporation that publishes a newsletter or magazine and sells advertising space in that publication will be engaging in business activities, and will not be a qualified nonprofit corporation").

[6] *See* Federal Election Commission, Electioneering Communications Reports, http://www.fec.gov/finance/disclosure/ec_table.shtml (listing organizations engaged in electioneering communications).

tions like the National Abortion Rights Action League or Defenders of Wildlife.[7]

Four circuits have recognized that the *MCFL* exemption as codified by the FEC is too grudging. The Fourth Circuit held that a nonprofit corporation was entitled to the *MCFL* exemption when it received corporate contributions comprising less than eight percent of its overall revenue. *Beaumont v. FEC*, 278 F.3d 261, 273 (4th Cir. 2002), *rev'd on other grounds*, 539 U.S. 146 (2003). The D.C. Circuit held that the NRA's $1,000 in corporate receipts was *de minimis* and therefore did not disqualify the organization from classification as *MCFL*-exempt. *FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 192 (D.C. Cir. 2001). The Eighth Circuit held that an organization was entitled to the *MCFL* exemption even though it engaged in "minor business activities" and received "insignificant contributions from business corporations." *Minnesota Citizens Concerned for Life v. FEC* ("*MCCL*"), 113 F.3d 129, 130 (8th Cir. 1997). And the Second Circuit has held that "a nonprofit political advocacy corporation, which in fact receives no significant funding from unions or business corporations, does not surrender its First Amendment freedoms." *FEC v. Survival Educ. Fund*, 65 F.3d 285 (2d Cir. 1995).

Each of these court of appeals decisions recognized that, when an incorporated group is "formed to disseminate political ideas, not to amass capital," then the mere receipt of a "small amount of corporate contributions" will not make such a group "a conduit for the type of direct spending [by for-profit corporations] that creates a threat to the political marketplace." *Beaumont*, 278 F.3d at 266 & n.2 (internal

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[7] *See* Federal Election Commission, FEC Disclosure Reports Advanced Search, http://www.fec.gov/finance/disclosure/advsearch.shtml (select "Independent Expenditure (Person or Group, Not a Committee)" under "Committee Type"; compare groups with a nine-digit "Committee ID" that begins "C9000").

quotations omitted). In seeking to limit these decisions, however, *see MCCL*, 113 F.3d at 130, the FEC has stated that "knowingly accepted prohibited donations will void a corporation's [*MCFL*] exemption, even if the corporation accepts only a *de minimis* amount." 60 Fed. Reg. at 35,301.

To obtain even these limited judicial victories, each grassroots group had to go to painstaking lengths in litigating against the FEC. And, despite these holdings, the FEC's regulations have not relented. Thus, the *MCFL* exception remains illusory from the perspective of groups like Appellee and *Amici*, available if at all only through costly, protracted and hard-fought battles against the Government's regulators.

C. PACs Are Not a Realistic Alternative for Many Grassroots Advocacy Organizations

This Court suggested in *McConnell* that advocacy groups like Appellee and *Amici*, when unable to qualify for MCFL status, can simply form PACs in order fund political ads. *See* 540 U.S. at 105-06, 204.[8] The FEC and Intervenors likewise trumpet PACs as ready alternatives for grassroots advocacy. *See* Brief of Appellant ("FEC Br.") at 3-4, *FEC v. Wisconsin Right to Life*, No. 06-969 (2007); Int. Br. 29-30. But the PAC alternative is in fact legally foreclosed to many nonprofit organizations, and prohibitively burdensome, expensive, or unsavory to many others.

1. PACs Are Foreclosed to § 501(c)(3) Organizations

Nonprofit advocacy corporations that qualify for tax exemption under Internal Revenue Code § 501(c)(3) are categorically forbidden from forming PACs, because they are barred from conducting *all* political activities. Specifically,

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[8] A corporation is permitted to fund electioneering communications and express advocacy through a PAC. *See* 11 C.F.R. §§ 114.5 & 114.11.

they are prohibited from "political campaign intervention," which includes "any and all activities that favor or oppose one or more candidates for public office."[9] For this reason, the IRS simply will not permit a § 501(c)(3) corporation to form a PAC. *See* Treas. Reg. § 1.527-6(g) (prohibiting § 501(c)(3) organizations from forming PACs); I.R.S. Tech. Adv. Mem. 200446033 (Nov. 12, 2004) (stating that a 501(c)(3) will be deemed to have intervened in a political campaign if it supports the establishment of a PAC).[10]

The FEC sought by rule to preserve the ability of § 501(c)(3) organizations to broadcast genuine issue ads that might technically fall within the definition of "electioneering communications." *See* Electioneering Communications, 70 Fed. Reg. 49508 (proposed Aug. 24, 2005). But that effort

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[9]Internal Revenue Service, Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations (FS-2006-17) (2006). The prohibition covers both "direct" and "indirect" forms of intervention, Treas. Reg. § 1.501(c)(3)-1(b)(3)(ii) (2006), in campaigns, and prevents "the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate," Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (2006). Penalties for political intervention can include revocation of the organization's tax-exempt status or in extreme circumstances, retroactive tax liability. *See* I.R.C. §§ 4955, 6852 (2006).

[10] Although the IRS has historically given § 501(c)(3) organizations some leeway to engage in communications technically considered "electioneering" under the FEC definition, it has recently begun aggressively enforcing the prohibition. *See, e.g.*, Internal Revenue Service, Project 302: Political Activities Compliance Initiative 25 (Final Report) (2006) (noting an increase in resources available to pursue proactive investigations). The IRS even investigated one California church because its rector encouraged his congregation to "vote your deepest values" during a Sunday sermon. *See* Patricia Ward Biederman & Jason Felch, *Antiwar Sermon Brings IRS Warning*, L.A. Times, Nov. 7, 2005.

was ultimately invalidated in light of BCRA. *See Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd* 414 F.3d 76 (D.C. Cir. 2005).

2. PAC Formation Imposes Significant Regulatory Burdens and Costs

While PACs are in theory available to some nonprofits devoted to issue advocacy, the battery of regulations governing the formation and operation of PACs impose often prohibitive difficulty, expense, and delay.

First, a PAC must assume a cumbersome array of, reporting and accounting obligations.[11] Second, a PAC's fundraising ability is severely limited. A PAC may solicit donations only from a "restricted class," 11 C.F.R. § 114.1(j), which in the case of a nonprofit advocacy group, typically includes its members, its administrative personnel, and their respective families. *See id.* Thus, a nonprofit PAC may not enlist all potential supporters for a particular issue, but only those previously enlisted as members. Like an airline that advertises not to all travelers, but only to those already signed up as frequent flyers, a PAC can receive only a fraction of its potential financial support. Third, PAC formation involves time-consuming procedures that retard the ability of grassroots advocacy groups to respond quickly to legislation that might crop up suddenly.[12] These regulatory burdens make PAC

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[11] *See* 11 C.F.R. § 102.2(a)(1)(iv) (appointment of treasurer); 11 C.F.R. § 104.1(a) (who must report); 11 C.F.R. §§ 102.2(a) & 104.14(a) (signing reports); 11 C.F.R. § 103.3(a) (depositing receipts); 11 C.F.R. § 102.7(c) (authorizing contributions and expenditures); 11 C.F.R. § 110.1(k)(3) (monitoring contributions); 11 C.F.R. §§ 102.9 & 104.14 (keeping records). Additional reporting requirements apply at the state level. *See* 2 U.S.C. §§ 433, 439.

[12] Unlike the large labor union or corporate parents of many PACs, grassroots advocacy groups often must rely upon contributions spawned by a particular political event like the introduction of a specific bill. *See, e.g.*, Madeline Stanionis, *When Only an*

formation infeasible for all but large, well-financed corporations.

3. Forming a PAC Contradicts the Mission of Some Apolitical Grassroots Groups

Even if PACs were in practice a viable alternative mode of speech, for many groups, PACs are anathema. As Justice Kennedy recognized in *McConnell*, "[a] requirement that coerces corporations to adopt alter egos in communicating with the public is, by itself, sufficient to make the PAC option a false choice for many civic organizations." *McConnell*, 540 U.S. at 332-33. The mission of many nonprofit advocacy groups like *Amici* is not to influence elections, but to advocate on issues. They therefore should not be required to operate as if they are essentially partisan, political committees.

D. As-applied Challenges to Section 203 Cannot Adequately Protect Grassroots Advocacy

Grassroots advocacy groups who seek to broadcast issue ads before elections can take little comfort in the possibility of bringing as-applied challenges to § 203. As the record in this case vividly illustrates, such challenges are expensive, protracted and uncertain—and, in any event, may be mooted altogether by the passage of time. In this case, WRTL still awaits judgment on the permissibility of ads it sought to broadcast *in 2004*.

Other grassroots advocacy groups have faced similar dilemmas. The Christian Civic League of Maine sought a preliminary injunction in April 2004 asking a district court to

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Online Appeal Will Do, Mal Warwick - Assoc. E-Newsl. (Mal Warwick Assoc., Berkeley, Cal.), July 2003, http://www.malwarwick.com/learning-resources/e-newsletters/jul03.html (describing NARAL's online fundraising drive triggered by the "partial-birth" abortion legislation of 2003, a drive that garnered its highest-ever return rate).

allow it to run a radio ad mentioning Maine Senators Snowe and Collins in connection with a federal marriage protection bill notwithstanding the blackout period. Not until September 2006 did the court issue a final decision, at which point it deemed the case moot. *Christian Civic League of Maine v. FEC*, No. 06-0614, slip op. at 7 (D.D.C. September 27, 2006), 2006 WL 2792683.

While the district court suggested that a grassroots group should simply sue earlier if it planned to broadcast an ad mentioning a candidate during a blackout period, such advice misconceives how issue advocacy works. Only groups that exist solely to influence elections can know what they might be saying before the next election; groups that respond to breaking issues cannot predict as much without the services of a soothsayer. Ironically, then, the groups most likely to deserve as-applied exceptions are least likely to be able to vindicate them in a timely fashion.

In sum, the "alternatives" supposedly available to *Amici* and like groups to fund "electioneering communications" despite § 203 are illusory. Section 203 operates in practice not merely to channel core political speech in key media in key time periods, but effectively to ban it. Accordingly, it merits strict First Amendment scrutiny.

II. NO COMPELLING INTEREST JUSTIFIES SECTION 203'S EFFECTIVE BAN ON PRE-ELECTION BROADCAST ISSUE ADVOCACY BY NONPROFIT GRASSROOTS GROUPS

Because § 203 operates as an effective ban on independent expenditures for broadcast advocacy by nonprofit grassroots groups during election time, it should be subject to the "exacting scrutiny" this Court has applied to other expenditure limitations in the campaign context. *Randall v. Sorrell*, 126 S.Ct. 2479, 2501 (2006); *see Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 607 (1996);

Buckley v. Valeo, 424 U.S. 1, 16 (1976). Section 203 regulates independent expenditures, which is to say *speech*—as opposed to the coordinated expenditures that would amount to contributions. *See FEC v. Colorado Republican Federal Campaign Committee*, 518 U.S. 431, 470, 476 (2001). Accordingly, the FEC and Intervenors must demonstrate a compelling interest to which § 203 is narrowly tailored.

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000). In this case, the government interests asserted are novel indeed. No prior decision of this Court has found upon record inquiry that "electioneering communications" by nonprofit grassroots organization threaten any government interest so compelling as to warrant suppression.

Congress has, to be sure, attempted to regulate election-related corporate expenditures since the early twentieth century. It has done so to prevent the corrupt exaction of *quid pro quo* favoritism more subtle than outright bribery with suitcases full of corporate cash. And it has done so to prevent distortion of the political marketplace through use of corporate war chests accumulated in the economic marketplace to fund express electoral speech. Nothing in these anti-corruption or antidistortion rationales, however, warrants the blackout of *any* broadcast by *any* nonprofit advocacy corporation that *so much as references* a candidate for federal office in the periods preceding elections.

A. Broadcast Advocacy By Nonprofit Grassroots Advocacy Groups Does Not Corrupt Candidates

The chief concern historically animating Congress's regulation of corporations' election-related spending "was the problem of corruption of elected representatives through the creation of political debts." *First Nat'l Bank of Boston v.*

Bellotti, 435 U.S. 765, 788 n.26 (1978). As one Senate leader explained in the debates preceding the Federal Corrupt Practices Act of 1925: "We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions." *United States v. Automobile Workers*, 352 U.S. 567, 576 (1957) (quoting Sen. Robinson, 65 Cong. Rec. 9507-08 (1924)) (ellipsis in original). This Court likewise acknowledged the anticorruption rationale in *Buckley*, holding that, "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined . . . ." 424 U.S. at 27.

This traditional anticorruption rationale, however, cannot justify the strictures § 203 places upon pre-election broadcast issue advocacy by nonprofit grassroots groups. This Court has never held that prevention of *quid pro quo* corruption was an interest warranting limits on independent expenditures. *See id.* at 45-46. Nor did concern with *quid pro quo* surface in BCRA's legislative history; to the contrary, Members of Congress complained that independent expenditures imperiled their desired control over their campaigns, not that issue ads made their rivals beholden to the advertisers. *See, e.g.*, Statement of Rep. Wamp, 144 Cong. Rec. H4787 (June 18, 1998) ("Pretty soon we as candidates will not even be able to control the message in our own campaigns.").

B. Broadcast Advocacy By Nonprofit Grassroots Advocacy Groups Does Not Distort the Political Marketplace

In *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), this Court for the first time upheld a restriction on independent political expenditures as satisfying strict scrutiny under the First Amendment. In upholding a ban on independent expenditures by a for-profit corporation, *Austin*

acknowledged a novel compelling interest—an interest in combating "the corrosive and distorting effects of [corporations'] immense aggregations of wealth." *Id.* at 660-61. By this reasoning, corporate wealth "unfairly" influences elections not by providing corrupt officials with reason to reward their corporate benefactors at the expense of the public, but rather by allowing corporations influence in the political marketplace that is a function of their economic wealth rather than their stakeholders' support of the ideas they espouse.

Amici respectfully submit that even on its own facts, involving a *for*-profit corporation, *Austin*'s antidistortion rationale is difficult to reconcile with this Court's free speech traditions. In *Buckley v. Valeo*, for example, the Court stated that "[t]he concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49. Likewise, this Court long held that "[t]he First Amendment rejects the highly paternalistic approach of statutes . . . which restrict what the people may hear." *Bellotti*, 435 U.S. at 792 n.30. To the extent that voters need to be better informed as to the source and *bona fides* of a particular advertisement in order to evaluate it effectively, the disclosure requirements of BCRA, which are not challenged in this case, serve that interest by means well short of an effective ban. *See, e.g.*, BCRA § 201, 2 U.S.C. § 434(f) (Supp. IV 2004).

But even if *Austin* were correctly decided with respect to the distorting effects of political speech by a *for*–profit corporation, that conclusion is inapplicable to speech by *non*-profit, grassroots advocacy groups like Appellee and *Amici*. This Court acknowledged in *Austin* the government's concern that "expenditures reflect actual public support for the political ideas espoused by corporations." 494 U.S. at 660. Of course, the expenditures of grassroots organizations do so. As this Court noted in *MCFL*, individuals contribute to nonprofit advocacy groups because such groups provide "a more

effective means of advocacy than spending the money under their own personal direction." *MCFL*, 479 U.S. at 261. Limiting the ability of nonprofit, grassroots advocacy groups to speak about issues of importance to them and to their individual supporters effectively silences people of modest means who band together to amplify their ideas in the political marketplace.

Moreover, the speech that the Court held regulable in *Austin* was express advocacy, a discrete and readily identified set that was, by definition, directed at influencing elections. Congress went much further in Title II of BCRA, defining and forbidding "a class of communications that are generally intended to influence electoral outcomes and are likely to have that effect." FEC Br. at 30. Even if *Austin* correctly identified a compelling interest in reducing the distorting effects of the corporate form in express advocacy by for-profit corporations, nothing in *Austin* presaged § 203's extension of this rationale to *Amici* or the ACLU alongside General Electric or General Motors. As this Court cautioned in *MCFL*, "[v]oluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form." 479 U.S. at 263.

C. Any Congressional Interest In Preventing Negative Advertising is Illegitimate

Because § 203 so poorly serves to prevent corruption or distortion as applied to grassroots nonprofits, it might be asked whether other motives may have been at work. To the extent that Members of Congress aimed to protect themselves from the unpleasant experience of "negative attack ads," their purpose was illegitimate. The public is entitled to hear negative advertisements, even around elections, no matter how much Members of Congress dislike them. *See generally McConnell*, 540 U.S. at 262-63 (Scalia, J., dissenting). Certainly deference to the judgment of the Legislature on election matters is inappropriate where it "risk[s] such

constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge." *Shrink Missouri*, 528 U.S. at 402 (Breyer, J., concurring). Congress' raw hostility to speech is not a legitimate interest, let alone a compelling one.

III. EVEN IF § 203 SERVES COMPELLING INTERESTS, IT IS NOT NARROWLY TAILORED TO ANY SUCH INTEREST

Were § 203's supposed ends compelling, its means are still far too ill-tailored to satisfy strict scrutiny. Strict scrutiny demands that any regulation of independent expenditures, even pursuant to a compelling interest, be pursued through the least restrictive means. *See, e.g.*, *Buckley*, 424 U.S. at 68; *United States v. Playboy Ent. Group*, 529 U.S. 803, 813 (2000); *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Sable Communications Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 637 (1980); *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Section 203 cannot satisfy this requirement. It is both overinclusive, sweeping in grassroots speech like that of *Amici* without preventing any demonstrable "corruption" or "distortion," and underinclusive, leaving wide berth for "corruption" and "distortion" of political markets through unfettered pre-election broadcast advocacy by rich individuals and media corporations and by the PACs that large and sophisticated corporations have the resources to form. These deficiencies could be avoided by restoring the original version of § 203, which would have permitted electioneering communications by nonprofit advocacy groups to the extent of their individual donations—a plainly less restrictive alternative.

A. In § 203 of BCRA, Congress Expressly Set Forth a Less Restrictive Alternative That *McConnell* Incorrectly Ignored

The best evidence that the current version of § 203 fails the narrow tailoring required by strict scrutiny is that Congress *itself* included within Title II a *less restrictive alternative* to an all-encompassing ban on "electioneering communications" by all corporations. Under the portion of § 203 known as the "Snowe-Jeffords amendment," organizations incorporated under Internal Revenue Code § 501(c)(4) and § 527(e)(1) would have been permitted to use their general treasury funds for "electioneering communications" so long as the communications were paid for exclusively with funds from individuals who are U.S. citizens, nationals, or lawfully admitted for permanent residence. 2 U.S.C. § 441b(c)(2). As Senator Jeffords explained, under the provision, "[a]ny organization can, and should be able to, use their grassroots communications to urge citizens to contact their lawmakers. Under the Snowe-Jeffords provision, any organization still can undertake this most important task." 147 Cong. Rec. S2813 (daily ed. March 23, 2001). The Snowe-Jeffords amendment thus provided an "exception for nonprofit corporations," representing a self-conscious "expansion of the law as it existed prior to BCRA." *McConnell v. FEC*, 251 F. Supp. 2d 176, 214 (D.D.C. 2003), *aff'd in part & rev'd in part*, 540 U.S. 93 (2003).

This exception was negated, however, by the addition of § 204 of BCRA, the so-called "Wellstone Amendment," which was inserted to *override* the Snowe-Jeffords exception of § 203 *in toto*. Section 204, now codified at 2 U.S.C. § 441b(c)(6), withdraws the exception for § 501(c)(4) and § 527(e)(1) corporations in the case of expenditures for "tar-

geted communications"—which, by definition, include *all* "electioneering communications."[13]

As Senator Wellstone explained the purpose of his superseding amendment: "It is to ensure that the sham issue ads run by interest groups fall under the same rules and prohibition that the McCain-Feingold legislation rightly imposes on corporations and union sham[] ads." BCRA, 147 Cong. Rec. S2846 (daily ed. Mar. 26, 2001). As Senator Wellstone further explained:

> Snowe-Jeffords forces disclosure of all ads that fall under this definition, but under this bill, only corporations and unions may not spend funds from their treasury or soft money for this purpose. . . . . [E]very other group and organization, pick and choose—it can be the NRA, it can be the Christian right, it can be the Sierra Club, it can be other organizations on the left, other organizations on the right, organizations representing every other kind of interest imaginable—they can continue to ... pour [money] into these sham ads.

Id. at S2846-47. In Senator Wellstone's view, the Snowe-Jeffords amendment of § 203 was unacceptable precisely because it would exempt certain nonprofit corporate speakers from the prohibition. The Wellstone Amendment aimed to close this perceived "loophole" by which nonprofit advocacy groups, conspicuously referenced by name, could otherwise

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[13] *Compare* 2 U.S.C. § 441b(c)(6)(A) (withdrawing Snowe-Jeffords amendment "in the case of a targeted communication") *with* 2 U.S.C § 441b(c)(6)(B) (defining "targeted communication" as coextensive with statutory definition of "electioneering communication"). *See McConnell*, 540 U.S. at 339 (Kennedy, J., concurring); *McConnell*, 251 F. Supp. 2d at 185 ("Section 204 ('The Wellstone Amendment'), in effect, withdraws the Snowe-Jeffords exception of Section 203.").

continue to exercise their First Amendment rights unimpeded by BCRA's electioneering-communications provisions.

While this Court recognized in *McConnell* that § 204 "does not, on its face, exempt *MCFL* organizations from its prohibition," 540 U.S. at 211, the Court nevertheless construed § 204 as including an exception for *MCFL* organizations in order to avoid the serious constitutional issue otherwise presented. *See id.* at 210-11. *Amici* respectfully submit that this was error. The canon of constitutional avoidance reflects a presumption of "respect for Congress," *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916), that serves the "basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made," *Almendarez-Torres v. United States*, 523 U.S. 224,238 (1998). But to trigger the canon, a "statute must be genuinely susceptible to two constructions." *Id.* Here, the statute with the Wellstone Amendment was unambiguous, rendering application of the avoidance canon inappropriate.[14]

McConnell erred further by ignoring Congress's specific prescription for reconciling BCRA with the First Amendment should the Wellstone Amendment prove unconstitutional. Congress went to extraordinary lengths to make the amend-

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[14] That "the Government itself concede[d] that § 316(c)(6) does not apply to MCFL organizations," *McConnell*, 540 U.S. at 211, is irrelevant. Neither the FEC nor the Solicitor General may cure the constitutional infirmity of § 204 by rewriting the statute contrary to Congress's express language and intent. *Cf. Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *id.* at 843 n.9. And they certainly cannot cure it by way of a speech restriction *broader* than that Congress itself provided by way of a less restrictive alternative, here the Snowe-Jeffords amendment of § 203.

ment severable and to provide a fallback scenario. As Senator Wellstone put it, "Under the worst case scenario, if the Supreme Court rules that groups covered by my amendment cannot be constitutionally barred from using treasury funds for these sham issue ads, then the rest of [BCRA] will be completely unaffected." 147 Cong. Rec. at S2847; *see* BCRA § 401 (providing that BCRA is subject to severability).[15]

Congress therefore made clear that, were the Wellstone Amendment's ban on electioneering communications by issue advocacy groups to be found unconstitutional, § 204 should be severed from the bill and the original Snowe-Jeffords provision of § 203 restored. By striking down the Wellstone amendment of § 204 as contrary to the constitutional dictate of *MCFL*, *without* restoring the Snowe-Jeffords exception of § 203 that was meant to serve in its stead, the Court effectively rewrote the statute.

To the extent that, per *Austin*, a compelling interest exists in avoiding distortion of the political marketplace through corporate war chests amassed in the economic marketplace, *see Austin*, 494 U.S. at 660, there is no doubt that exempting nonprofit advocacy groups from the ban on electioneering communications to the extent of their individual contributions would have been the less restrictive means of achieving it. Snowe-Jeffords directly addresses the *Austin* interest of preventing corporate money from distorting the contours of political debate at election time. The Court has held that

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[15] *See also McConnell*, 540 U.S. at 339 (Kennedy, J., concurring); *McConnell*, 251 F. Supp. 2d at 215 ("The Wellstone Amendment was codified in a separate section of BCRA in order to preserve severability: hence, if the Court finds the inclusion of section 501(c)(4) organizations and section 527 organizations within the ban on electioneering communications to be unconstitutional, the Wellstone Amendment can be cleanly struck from the law and the original Snowe-Jeffords exception for these groups will be restored.").

Congress may require a corporation's expenditures to bear a meaningful "correlation," *Austin*, 494 U.S. at 660, or to constitute a "rough barometer" of, the public's support for its political views. *MCFL*, 479 U.S. at 258. The Snowe-Jeffords provision, by permitting electioneering communications of nonprofit advocacy organizations only "if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence," 2 U.S.C. § 441b(c)(2), vindicates that interest. It prevents large accumulations of corporate wealth from distorting political debate in ways "that have little or no correlation to the public's support for the corporation's political ideas," *Austin*, 494 U.S. at 660, while permitting advocacy that *does* correlate with public support because paid for exclusively by individual citizens.

Thus, this Court need only permit BCRA to have its congressionally intended effect in order to resolve this case and others like it involving nonprofit advocacy groups.[16]

B. The Ban On Electioneering Communications Is Overinclusive In Regulating Too Many Issue Ads By Grassroots Advocacy Groups

By sweeping genuine issue ads into the same net as ads intended to influence elections, § 203 regulates too many *speakers* relative to its accepted ends as well as too much

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[16] *Amici* understand from counsel for Appellee that, in accordance with the Snowe-Jeffords exception in § 203, WRTL has set up and tracked a separate fund consisting of individual contributions that might be used to fund "electioneering communications." Thus, invalidation of § 204 would suffice cleanly to dispose of this case. *Amici* further submit, however, that to the extent that § 501(c)(3) corporations are not expressly covered under the terms of the Snowe-Jeffords exception, they are constitutionally entitled to such exception no less than any other nonprofit funded by individuals.

speech. Nonprofit advocacy groups like *Amici* speak to issues of public policy and public values that naturally involve reference to candidates for federal office, without striving to swing any particular election result.

In *McConnell*, this Court discounted any notion that § 203, on its face, sweeps too broadly into "genuine issue ads," concluding that BCRA's application to pure issue ads was not substantial relative to its application to election-related advertising. *McConnell*, 540 U.S. at 207. If that conclusion appeared right at the time, then it has proved wrong since. This case amply attests that, as applied following *McConnell*, BCRA inhibits far more constitutionally protected speech, including pure issue advocacy than the Court may have originally surmised. WRTL's ads concerned a filibuster issue that loomed large in 2004, in reference to one Senator who was up for reelection and one who was not. Such ads are just the tip of the iceberg, as other *Amici* well demonstrate.

If anything, the FEC and Intervenors now seek even broader scope for § 203. Whereas this Court in *McConnell* repeatedly treated a broadcast issue advertisement's *purpose* as the touchstone, *see* 540 U.S. at 206, Appellants argue that WRTL's ads are regulable merely because "advertisements such as WRTL's would have an electoral *effect* in the context of the Wisconsin senatorial race." Int. Br. at 11 (emphasis added). Indeed, as justification for prohibiting WRTL's issue advertising, appellants offered testimony that, "within the political context of an election campaign, any advertising that addresses topics of current debate is *very likely to have electioneering effects, regardless of the purported purpose* of the ad." *Id.* (emphasis added). Setting aside any evidence about whether WRTL's ads were *intended* to influence the election, the FEC and Intervenors now insist that any *effect* on an election—irrespective of purpose—justifies suppression. In fact, they argue that because the judicial filibuster issue "played an important role" in the 2004 Wisconsin Senate race, *any*

advocacy relating to the judicial filibuster issue "would undoubtedly influence the election" and therefore could be suppressed under BCRA. *Id.* This argument suggests that § 203 may now sweep into its net issue-related political speech as to which the only objection is that it may ultimately have an effect on an election—a factor little more substantial than the weather on Election Day. Such a broad mandate to suppress issue advocacy that might influence public opinion exceeds anything sanctioned by this Court in *McConnell*. Either the interpretation of the law advanced by the FEC and Intervenors is wrong, or else, if it is right, then *McConnell* is due to be revisited and § 203's scheme as a whole struck down.

C. The Ban On Electioneering Communications Is Underinclusive In Permitting Unfettered Pre-Election Advocacy by Wealthy Individuals and Media Corporations

At the same time that nonprofits such as *Amici* and Appellee are restricted under § 203, wealthy individuals such as George Soros and Rupert Murdoch are able to convey *their* political views over the airwaves at unbridled strength. Likewise, mega-corporations like General Electric, Time Warner, Viacom, and Disney that happen to own broadcast stations, even while operating them in the economic realm for profit, can promote *their* political views, and others they may see fit to license, over the airwaves in the form of "news stor[ies], commentar[ies], or editorial[s]" that remain uncurbed in pre-election time periods. 2 U.S.C. § 434(f)(3)(B)(i); FECA § 304(f)(3)(B)(i) (BCRA electioneering communication media exemption). Finally, the most sophisticated and wealthy corporations can marshal their resources to utilize PACs and to devise other end-runs around BCRA.

The little guy is the biggest loser in all this. Small, organic, grassroots associations comprised of like-minded individuals of modest means are less likely to navigate the

daunting complexities and challenges of FEC regulations. *See MCFL*, 479 U.S. at 255. The predictable and obvious result—far better documented than the conjectural distortion rationale of *Austin* and *McConnell*—is that § 203 deprives the public of the voice of ordinary Americans relative to that of the moneied elite. What could be more distorting and antithetical to the First Amendment?

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

STEPHEN W. REED
MATTHEW A. REED
REED & BROWN, LLP
35 North Lake Avenue
Suite 960
Pasadena, CA 91101
(626) 449-4521

KATHLEEN M. SULLIVAN
Counsel of Record
DEREK L. SHAFFER
STANFORD CONSTITUTIONAL
LAW CENTER
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 725-9875

Counsel for Amici Curiae

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FEDERAL ELECTION COMMISSION,

Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

and

SENATOR JOHN MCCAIN, REPRESENTATIVE TAMMY BALDWIN, REPRESENTATIVE CHRISTOPHER SHAYS, AND REPRESENTATIVE MARTIN MEEHAN,

Appellant-Intervenors,

v.

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

On Appeal From the United States District Court For The District of Columbia

BRIEF FOR *AMICI CURIAE* THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, COMMON CAUSE, INC., THE GREENLINING INSTITUTE AND UNITED STATES PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF APPELLANT

DANIEL R. ORTIZ
Counsel of Record
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW*
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

*Affiliation listed for address purposes only.

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FEC v. *Massachusetts Citizens for Life, Inc.*,
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McConnell v. *FEC*,
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Thomas v. *Collins*,
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11 C.F.R. 109.21.....25

26 C.F.R. 56.4911-2(b)(2)(i)-(ii).....26, 27

26 C.F.R. 56.4911-2(b)(2)(iii)(B).....27

26 C.F.R. 56.4911-2(d)(1).....27

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2 U.S.C. 434(f)([illegible] & (c) (Supp. 2004).....10

2 U.S.C. 441(d)(1) (Supp. 2004).....17

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Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 2

Miscellaneous

Bear (Reagan), http://livingroomcandidate.movingimage.us/election/index.php?nav_action=election&nav_subaction=overview&campaign_id=173 (left click on bear photo) (streaming video); http://livingroomcandidate.movingimage.us/election/index.php?nav_action=election&nav_subaction=overview&campaign_id=173 (left-click on bear photo; then left-click on "transcript")(transcript) 19

Francis X. Clines, *Reagan Promises No Benefit Cuts For Any Retirees*, N.Y. Times, Oct. 10, 1984, at A1 23

Peace Little Girl (Daisy) (1964, Johnson), http://livingroomcandidate.movingimage.us/style/index.php?nav_action=style&nav_subaction=110 (streaming video) (last visisted Feb. 20, 2007); http://livingroomcandidate.movingimage.us/style/index.php?nav_action=style&nav_subaction=110 (transcript) (left-click on "transcript") (last visited Feb. 20, 2007) 24-25

Prouder, Stronger, Better (Reagan), http://livingroomcandidate.movingimage.us/election/index.php?nav_action=election&Nav_subaction=Overview&campaign_id=173(streaming video) (last visited Feb. 20, 2007);

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http://livingroomcandidate.movingimage.us/election/index.php?nav_action=election&nav_subaction=overview&campaign_id=173 (transcript)(left-click on "transcript")(last visited Feb. 20, 2007) 21-22

Resign, Mr. Speaker, http://www.washtimes.com/op-ed/20061002-102008-9058r.htm 13

Brian Ross and Maddy Sauer, *Foley Resigns Over Sexually Explicit Messages to Minors,* http://blogs.abcnews.com/theblotter/2006/09/foley_resigns_o.html 13

Rhonda Schwartz and Maddy Sauer, *Sixteen-Year-Old Who Worked as Capitol Hill Page Concerned About E-mail Exchange with Congressman,* http://blogs.abcnews.com/theblotter/2006/09/sixteenyearold_.html (last visited Feb. 20, 2007) 13

Martin Tolchin, *White House Approval Sought On a Compromise Spending Plan*, N.Y. Times. Oct. 10, 1984 23

Victory (08/13/2004), Bush), http://livingroomcandidate.movingimage.us/election/index.php?nav_action=election&Nav_subaction=Overview&campaign_id=178 (streaming video)(left-click on swimming photo); http://livingroomcandidate.movingimage.us/election/index.php?nav_action=election&nav_subaction=overview&campaign_id=178

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INTEREST OF *AMICI CURIAE*[1]

The League of Women Voters of the United States (the "League") is a nonpartisan, community-based organization that encourages informed and active participation of citizens in government and seeks to influence public policy through education and advocacy. The League is organized in more than 850 communities in every state and has more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than two decades.

Common Cause is a nonprofit, nonpartisan citizens' organization with approximately 300,000 members and supporters nationwide. Common Cause has been concerned with the growing problem of soft money in the federal political process, and has publicly advocated for appropriate regulation in order to restore integrity to the electoral system. Common Cause was a strong advocate for congressional enactment of the Bipartisan Campaign Reform Act of 2002.

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[1] The Department of Justice and Wisconsin Right to Life, Inc. have consented to the filing of this brief in letters which accompany this filing. The Appellant-Intervenors have filed a general written consent to the filing of *amicus* briefs with the Court. No person or entity other than the *Amici Curiae*, their members, or counsel made any monetary contribution to the preparation or submission of this brief. No present counsel for any party authored this brief in whole or in part. Counsel for *Amici*, however, was listed among counsel for the Intervenor-Appellants in early proceedings before the district court.

The Greenlining Institute is a non-partisan, non-profit organization that works to improve the quality of life for low-income and minority communities throughout the United States. The institute was founded in 1993 and emerged from the Greenlining Coalition, considered the oldest coalition of African-American, Asian-American/Pacific-Islander, and Latino community leaders organized around a common purpose. The Greenlining Institute's major mission is to create an antidote to redlining practices which have had adverse consequences in the ability of low-income and minority communities to obtain financial services and products.

The National Association of State PIRGs ("U.S. PIRG") represents state Public Interest Research Groups ("PIRGs") at the federal level, including in the federal courts. U.S. PIRG and many state PIRGs have long been interested in campaign finance issues and the resolution of this case will assist them in their advocacy for effective and comprehensive campaign finance reforms.

All amici joined in filing an amicus brief in this Court in the first round of litigation, *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410 (2006) (per curiam), and several of them have filed amicus briefs in this Court in other constitutional campaign finance cases, including *McConnell* v. *FEC*, 540 U.S. 93 (2003).

SUMMARY OF ARGUMENT

Largely in response to mounting sham issue advocacy in federal elections, all of which evaded reasonable restrictions on corporate and labor spending as well as long-standing disclosure requirements, Congress passed and the President signed the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"). One of

its central provisions, Title II, barred corporations and unions from funding so-called "electioneering communications" out of their general treasuries and required disclosure of "electioneering communications" funded from other sources. In *McConnell* v. *FEC*, 540 U.S. 93 (2003), this Court upheld these electioneering provisions on their face except insofar as they involved certain "ideological nonprofits" meeting the strict conditions this Court had outlined earlier in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263-64 (1986).

Wisconsin Right to Life, Inc. ("WRTL") now seeks to create an as-applied exception large enough to swallow up Title II itself. Although it couches its challenge to these same provisions as limited to their application to vaguely defined "grassroots lobbying," the exception WRTL seeks would not only exempt many ads, like the sham issue ads considered in *McConnell* itself, designed to influence federal elections and likely having that effect, but also ads nearly identical to those run by federal candidates themselves in past elections. The "grassroots lobbying" test created by the district court, as well as the test WRTL itself promoted below, would open the door to corporations and unions funding the "functional equivalent of express advocacy" from their general treasuries, a practice which this Court found Congress could bar in *McConnell*. 540 U.S. at 206. Although WRTL claims that these ads intend only to encourage voters to lobby their representatives on legislation, none of these ads directly gives voters the rudimentary information they would need to place a phone call or write a letter or email to their representatives. Their aim is candidate, not legislative, advocacy.

ARGUMENT

I. SINCE WRTL'S THREE ADS ARE THE "FUNCTIONAL EQUIVALENT OF EXPRESS ADVOCACY," THEY SHOULD RECEIVE NO CONSTITUTIONAL EXEMPTION.

In *McConnell*, this Court held that BCRA's "electioneering communications" provisions could constitutionally apply to ads that "are the functional equivalent of express advocacy." *Ibid.* This was a simple inquiry, turning completely on whether "the ads are intended to influence the voters and have that effect." *Ibid.*

At the time of the 2004 election, Senate filibustering of judicial nominees was a key issue in the Wisconsin Senate race, as well as a national, partisan campaign issue. All three Wisconsin Republican Senate candidates had made it a key issue in their primary races, as had the state Republican Party, which listed this issue as one of four reasons to defeat Senator Feingold. See Def. FEC's Exhs. Submitted in Supp Of Its Opp'n to Pl.'s Mot. For a Prelim. Inj., Exh. 15 at 2, *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-1260 (D.D.C.) (3-judge court). Further, WRTL itself and its affiliated PAC made the judicial filibuster a campaign issue, citing it both as a reason they had endorsed the three Republican opponents of Senator Feingold and as a reason that one of their "top election priorities" was "to send Feingold packing!" See *id.* Exh. 4 (WRTL PAC); Exh. 20 (WRTL). WRTL's PAC said that "the defeat of Feingold must be uppermost in the minds of the Wisconsin right to life community in the 2004 elections." See *id.* Exh. 4 at 2. And the PAC chair stated, "[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees." See *ibid.*

These statements were entirely consistent with WRTL's past electoral positions. Through its PAC, it has made

significant independent expenditures to defeat Senator Feingold, as has the National Right to Life PAC. In fact, WRTL PAC's FEC reports itemizing its independent expenditures in the 1992 and 1998 congressional elections list 100 percent of its independent expenditures as opposing Senator Feingold. See *id.* Exhs. 8 & 9.

WRTL also heavily publicized Senator Feingold's support of the judicial filibuster and issued several press releases criticizing him for his vote. In this context, the fact that its proposed electioneering communication ads did not *themselves* specifically state Senator Feingold's position on the issue matters little, since WRTL had already used other means to publicly disseminate Senator Feingold's position, as did his three Republican opponents and the Republican state party, all of whom had attacked Senator Feingold repeatedly for his position. Thus, when WRTL's electioneering communication ads referred to Senator Feingold in the context of criticizing "a group of Senators" for conducting an ongoing filibuster that is "not fair" and "causing gridlock," it was implausible to maintain that this criticism would not attach to Senator Feingold and affect his Senate race.

In this context, WRTL's representation that its proposed electioneering communication ads to Wisconsin voters in the immediate preelection period would have had *only* a grassroots lobbying purpose strains credulity past the breaking point. The facts that the topic of these ads—the Senate filibuster of judicial nominees—is one that both the Republican Senate candidates and WRTL identified as a key campaign issue and that the ads gave their listeners no direct information about how to contact any candidates undermine WRTL's claim that these electioneering communications amount to no more than grassroots lobbying. They did not urge listeners to vote any particular way or even mention the up-coming candidate election because they did not need to. The listeners would have understood that much and could

have been counted on to place each ad within its obvious context and understand its point—to vote for or against particular candidates.

As this Court recognized in *McConnell*, an ad's indirect direction is direction nonetheless and makes the ad "the functional equivalent of express advocacy." 540 U.S. at 206. Considered in their actual context, WRTL's three ads meet *McConnell*'s test: they were intended to influence the election and likely would have had that effect. For that reason alone, this Court should reverse the district court. There is no need for it here to design a test for any "closer" cases.

II. THE DISTRICT COURT'S FOUR-CORNERS, FIVE-FACTORS APPROACH CREATES A "MAGIC FEATURES" TEST, WHICH, LIKE THE "MAGIC WORDS" TEST THIS COURT REPUDIATED IN *McCONNELL*, PERMITS CORPORATIONS TO FUND FROM THEIR GENERAL TREASURIES ADS INTENDED TO INFLUENCE FEDERAL ELECTIONS AND HAVING THAT EFFECT.

In exempting WRTL's three ads from BCRA's source and disclosure limitations, the district court carved out a very broad category of "grassroots lobbying." It described its test as follows:

> this Court will limit its consideration to language within the four corners of the anti-filibuster ads that, at a minimum: (1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do

> anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate. In addition, as to the televised ad, the Court will also look to the images displayed in concert with the language to evaluate whether they otherwise accomplish the prohibited result.

Appellant-Intervenors' J.S. App. 18a. Like the "magic words" test repudiated by this Court in *McConnell*, however, the district court's test resolutely ignores an ad's context, focusing instead exclusively on its bare words and images. Also like the discredited "magic words" test, the district court's test ignores an ad's actual intent and effect, which this Court in *McConnell* identified as the essential constitutional concerns—the keys to distinguishing ads whose funding can be regulated from those whose cannot. There is only one real difference between the approach this Court rejected in *McConnell* and that adopted by the district court—that between eight "magic words," *Buckley* v. *Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam), and five "magic features." So long as an ad (1) references a live legislative issue, (2) avoids attributing a position to a named candidate, (3) urges the viewer to do no more than contact the candidate about the referenced issue, (4) avoids promoting, attacking, supporting, or opposing the named candidate, and (5) avoids reference to the election, candidacy, or political party of the candidate, corporations can fund it from their general treasury funds without disclosure. Indeed, since the district court did not say that an ad had to exhibit all five of these features—just that it would "limit its consideration" to them—the district court

might well exempt from disclosure and source requirements ads containing only some of these features.[2]

In addition to violating this Court's instruction that any exemption has to rest on an ad's intent and likely effect, the district court's test poses at least four particular problems. First, any test for "grassroots lobbying" should require that the ad urge the viewer to actually lobby an elected official. The district court's does not. Although the district court's test would not exempt an ad that "exhorts the listener to do anything *more* than contact the candidate about the issue," Appellant-Intervenors' J.S. App. 18a (emphasis added), it nowhere requires an ad to even do just that—exhort the listener to contact the candidate. This is a significant omission.[3] An ad could satisfy this part of the test by not exhorting the viewer to do anything at all. Indeed, many

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[2] It is difficult to describe the district court's inquiry as even a "test." The district court gestured broadly at the five features but did not say which ones were more or less important, how many were needed, or whether they could be balanced against each other. This alone will create great confusion in future cases if this Court approves the district court's test. In the remainder of this brief, *Amici* will argue *as if* the district court would insist that all five features be present for an ad to be considered exempt "grassroots lobbying." That, of course, is the narrowest possible interpretation of the district court's test but one nevertheless broad enough to eviscerate BCRA's "electioneering communications" provisions. To the extent the district court would not insist that all five features be present, the exemption and its dangers are larger still and the test would allow corporations to fund from their general treasuries even more advertising intended to influence federal elections and having that effect.

[3] Even if in an effort to better align the test with the materials it seeks to identify this Court cured this particular omission, a corporation could easily continue to fund such ads as before by including a pro-forma request that the viewer contact the candidate—much as advertisers did under the now-discredited "magic words" test. Even if cured, in other words, this feature of the test would have little practical bite.

powerful ads run by candidates themselves do not exhort the voters to do anything. See, e.g., *infra* 15-23. They do not need to because the voter understands their implicit call. By limiting inquiry to the "four corners" of the ad, however, the district court's "magic features" test assumes that voters are dysfunctional, unsocialized audiences that understand an ad's language and images only in a vacuum.

Second, the test nowhere requires that the ad give the viewer the information the viewer would need to actually lobby a candidate. The district court's test would exempt ads, like WRTL's, that urge viewers to contact candidates but fail to tell them how they can do so. Surely, though, any genuine grassroots lobbying ad would let the viewer know how to lobby by displaying for a sufficient amount of time the candidate's contact information, even if it is just a simple phone number or email address. WRTL's three ads do not, thereby revealing that their true intent was not to have viewers contact Senator Feingold about a possible filibuster but rather to change the way the viewer judged Senator Feingold generally in the hope that that viewer would later vote. The district court's "contact" factor, then, requires neither that the ad urge any lobbying at all nor that the ad give the viewer the rudimentary information she would need to lobby on her own. Surely any ad that genuinely intended to encourage grassroots lobbying on an issue and wanted to have any such effect would at a minimum urge contact and provide this simple information.

Third, the district court's exception is not narrowly tailored for its own putative aim. Nearly all genuine and effective grassroots lobbying will be directed to a representative's constituency, not elsewhere. An organization interested in changing the views of a member of the New York City Council, for example, is unlikely to advertise in Idaho for people to call the councilmember and make their views known. Such advertising would be wasted because the

New York councilmember would likely be unmoved by contact from outside her district, let alone from outside her city, state, and even region. BCRA's "electioneering communications" provisions reflect this simple insight by covering only specific communications "targeted to the relevant electorate." 2 U.S.C. 434(f)(3)(A)(i)(III) & (c) (Supp. 2004). The district court's exception, however, would characterize as "grassroots lobbying" an ad broadcast nationwide in a presidential election where the issue was before a state or local body. Thus, so long as an ad somewhere mentioned an issue facing the executive branch of Texas government—it would not even have to make clear that the issue was pending there—and displayed none of the other "magic features" it could be run nationwide during an election in which the governor of Texas was a presidential candidate. The ad's failure to target the candidate's constituency undercuts any argument that its real intent concerns grassroots lobbying. Yet, the district court's test would treat such an ad as if it were the real thing.

Finally, the fourth factor in the district court's "magic features" test—that the ad not "promot[e], attack[], support[], or oppos[e] the named candidate" ("PASO")—cannot be straight-forwardly applied to anything other than ads funded by organizations with a major purpose of influencing federal elections. The district court lifted its PASO factor from 2 U.S.C. 431(20)(A)(iii) (2004), part of the definition of "federal election activity." In *McConnell*, this Court upheld this PASO standard against vagueness challenge as applied to spending by state political parties. 540 U.S. at 170 n. 64. This Court has never upheld it, however, as applied to individuals and organizations without such a major purpose and has, in fact, from the time of *Buckley* applied a different, much stricter vagueness standard to regulations affecting their activities.

In *Buckley*, for example, this Court considered whether an amendment to the Federal Election Campaign Act ("FECA") requiring disclosure of certain "expenditures," defined as the use of money "for the purpose of influencing" the election of candidates for federal office, was unconstitutionally vague. 424 U.S. at 76-82. This Court held that the statutory term "expenditure" posed no vagueness problems as applied to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate * * * [because their spending is,] by definition, campaign related." *Id.* at 79. With respect to others without such a major purpose, however, this Court viewed the statutory term very differently. To avoid constitutional vagueness concerns, it "construe[d] the ter[m] to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80 (footnote omitted). A standard permissible for major-purpose actors, it found, was just too vague to be applied to others. The Court then tightened the term up with respect to other funders of advertising by pointing to another part of its opinion where it had already construed the phrase "advocating the election or defeat of a candidate" to avoid similar vagueness concerns. *Id.* at 42-44. There it had made clear how direct these express terms of advocacy had to be: "This construction would restrict [the provision's] application * * * to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

The PASO factor of the district court's test is, however, even vaguer than the phrase "advocating the election or defeat of candidate" from *Buckley*, which gave birth to the "magic words" test. Each of this factor's individual terms—"promotes, attacks, supports, or opposes the named candidate," Appellant-Intervernors' J.S. App. 18a—is at least as vague as the phrase from *Buckley* and collectively they so

compound generality that the overall PASO term can possesses little firm meaning at all *when applied to organizations with no major purpose of influencing federal elections*. As this Court noted in *Buckley*, such a vague test "compels the speaker to hedge and trim." 424 U.S. at 43 (quoting *Thomas* v. *Collins*, 323 U.S. 516, 535 (1945)). That the vagueness occurs in a judicially-created exception to a facially valid regulatory scheme makes no difference. A speaker would still be unsure on which side of the muddied line his communication would fall and what would be its consequences. Ironically, the district court has created a possibly unconstitutionally vague exception to a definition of "electioneering communications" that this Court itself recognized as crafted—indeed, successfully crafted—to avoid vagueness concerns. *McConnell*, 540 U.S. at 194. The district court will not be able to apply the PASO factor to advertisements funded by non-major purpose organizations, like unions and ordinary business corporations, without tightening it up in some serious fashion.

The district court could later, of course, avoid these vagueness concerns the same way this Court did in *Buckley*. It could reinterpret "promotes, attacks, supports, or opposes" to require "magic words." (Indeed, it may have no other choice. The other apparent alternative, a sharp, "legislative" scheme, like BCRA's careful four-part definition of "electioneering communications," would seem to be unavailable to it. It is, after all, for Congress to legislate, not the courts.) Taking this course would certainly give the "grassroots lobbying" exemption sharper definition. A speaker could better predict when his communications would find safe harbor. It would, however, resurrect "magic words"—a doctrine this Court repudiated in *McConnell* precisely because it failed to distinguish between election advocacy and other speech—in the guise of a constitutional exemption. This failed doctrine would rise again, now nesting happily within the all-embracing "magic features" test

whenever that test came to be applied to a non-major purpose entity.

The effect of the district court's test if tightened up this way can be seen in the type of ads it would allow corporations to fund directly from their general treasuries without disclosure. In the last federal general election, for example, one issue arising completely within the 60-day window of the electioneering communications provisions was the Mark Foley scandal. On September 28, 2006, ABC News reported that in 2005 Congressman Foley had sent email messages to a former Congressional page, asking for, among other things, a photo and certain personal information. Rhonda Schwartz and Maddy Sauer, *Sixteen-Year-Old Who Worked as Capitol Hill Page Concerned About E-mail Exchange with Congressman*, http://blogs.abcnews.com/theblotter/2006/09/sixteenyearold_.html (last visited Feb. 20, 2007). A day later Congressman Foley resigned after ABC News read sexually explicit instant messages that he had allegedly sent to another former page. Brian Ross and Maddy Sauer, *Foley Resigns Over Sexually Explicit Messages to Minors*, http://blogs.abcnews.com/ theblotter/2006/09/foley_resigns_o.html (last visited Feb. 20, 2007). In the following days, additional pages alleged inappropriate conduct dating back several years.

The scandal, coming shortly before the election, provoked deep and widespread criticism of the Republican House leadership for failing to protect vulnerable minors and for allegedly covering up Representative Foley's conduct for some time. On October 3, 2006, the lead editorial of The Washington Times called on House Speaker Dennis Hastert to resign. *Resign, Mr. Speaker*, http://www.washtimes.com/op-ed/20061002-102008-9058r.htm (last visited Feb. 20, 2007). To many, Representative Foley's disgrace and the House leadership's failure to adequately address it greatly contributed to the results of the November House elections.

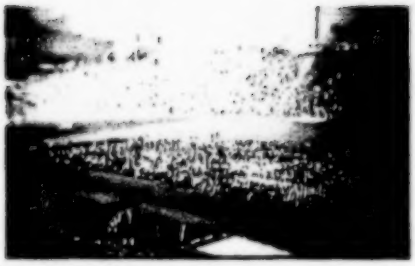
The district court's test, if modified to avoid the vagueness concerns that attend non-major purpose groups, would have allowed corporations to fund from their general treasuries powerful ads featuring Foley intended to influence the outcome of House elections—all without disclosure. A business corporation could have run an ad stating that the House of Representatives failed to protect the youth that American families entrusted to it and had covered up a possible crime to protect one of its own members—all the time running powerful visual images suggesting sexual exploitation of vulnerable teenagers by those in power. The ad could have ended by prominently featuring a picture of Mark Foley, universally reviled at the time, and transitioning to a picture of the local incumbent member of the House, identified by name as the Congressperson for the district. It could have capped the visuals with the words "Stop Congressional Sexual Exploitation of America's Young" rolling in red across the screen.

A corporation would presumably have intended such an ad to directly influence the election rather than Congress's supervision of its pages—an issue far beyond ordinary corporate concern. And the ad, if done properly, would certainly have had that effect. Yet, the district court would consider the ad protected "grassroots lobbying." The ad would have (1) referenced a live issue in Congress, (2) avoided attributing any position to the individually named candidate, (3) not urged the viewer to do anything more than contact the candidate about the issue (indeed, it would not have urged any contact at all), (4) not on its face promoted, attacked, supported, or opposed the named candidate in a way vagueness concerns pertaining to non-major purpose groups would require, and (5) not referred to any election or candidacy or identified the candidate's political party. The ad would have possessed every one of the "magic features" the district court requires. In the name of the First Amendment, a

corporation could have run such an ad from its general treasury funds without any disclosure.

III. THE DISTRICT COURT'S "MAGIC FEATURES" TEST WOULD EVEN CLASSIFY MANY EXISTING CANDIDATE ADS, WHICH ARE CERTAINLY INTENDED TO INFLUENCE THE ELECTION AND LIKELY HAVE THAT EFFECT, AS EXEMPT "GRASSROOTS LOBBYING."

The district court's test would misclassify as "grassroots lobbying" many ads clearly intended to influence federal elections and having that effect, namely, ads nearly identical to those run by the candidates themselves but funded by non-major purpose entities. Many candidate ads in recent presidential elections and some of the most powerful candidate ads since the creation of television would with little or no modification satisfy the district court's "magic features" test as modified to avoid the vagueness concerns attending its application to non-major purpose groups. Consider *Victory*, a 30-second television ad run by the Bush campaign in the 2004 election. It sought to tie the United States military operations in Iraq, one of the most prominent legislative and executive issues of the time, to themes of freedom and democracy-building by focusing on that year's summer Olympics, an event many Americans followed.



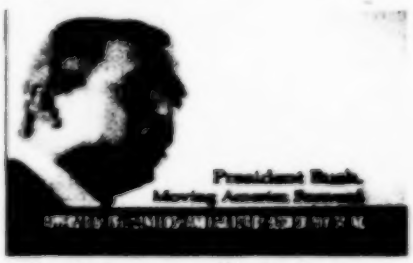
Voice Over:
In 1972...there were 40 democracies in the world.

Today...120.

Freedom is spreading throughout the world like a sunrise.

And this Olympics... there will be two more free nations... And two fewer terrorist regimes.

With strength, resolve and courage, democracy will triumph over terror.



And, hope will defeat hatred.

Victory 08 13 2004, Bush). http: livingroomcandidate.movingimage.us election index.php?nav_action=election&nav_subaction=overview&campaign_id=178 (streaming

video)(left-click on swimming photo)(last visited Feb. 20, 2007), http://livingroomcandidate.movingimage.us/election/index.php?nav_action=election&nav_subaction=overview&campaign_id=178 (transcript)(left-click on swimming photo; then left-click on "transcript")(last visited Feb. 20, 2007).

Absent the "stand-by-your ad" and source disclosures, which federal law mandates for candidate-run advertisements, see 2 U.S.C. 441(d)(1) (Supp. 2004), this ad displays all the "magic features" the district court requires. First, it references the Iraq war, a live issue before both the legislative and executive branches.[4] Indeed, few, if any, issues were more prominent at the time. Second, it avoids attributing a position on the war to George W. Bush, the featured candidate. (Of course, it does not need to. The audience could not have failed to know the President's position.) Third, it does not "exhort[] the [viewer] to do anything other than contact the candidate about [the war.]" Appellant-Intervenors' J.S. App. 18a. Indeed, it does not exhort the viewer to do anything at all, presumably because such contact is not the ad's ambition. Fourth, within its "four corners" the ad does not "promote[], attack[], support[], or oppose[]" President Bush. By associating the President with "[F]reedom," "sunrise," "strength," "democracy," "courage," "triumph over terror," a "hope [that] will defeat hatred," and

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[4] Although the district court's test, like the one WRTL proposes, speaks of legislative issues, there is no reason why "grassroots lobbying" cannot concern issues before the executive branch of government. In canvassing candidate ads from past presidential elections in this section of their brief, *Amici* will assume that such an executive "grassroots lobbying" exemption would apply during the relevant time periods preceding federal elections in which a sitting president was running for office. If that is wrong, however, *Amici*'s examples would still show how much candidate advertising in general could be exempted under the district court's test when funded by non-major purpose groups.

"[m]oving America [f]orward," not to mention the formal grace and beauty of women's Olympic butterfly swimming, the designers of the ad intended to influence voters in his favor but the ad nowhere directly or expressly "promotes" or "supports" him as it might have to when applied to non-major purpose groups. It does not need to. As this Court noted in *McConnell*, such heavy-handedness would be unnecessary and could backfire. 540 U.S. at 193 & n.77. "All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their [sic] throat." *Id.* at 193 n.77 (quoting *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 305 (D.D.C. 2003)(opinion of Henderson, J.)(quoting declaration of Douglas L. Bailey, founder, Bailey, Deardourff & Assoc. 1-2, App. 24, ¶3)). Fifth, nothing in the ad refers to the upcoming election, President Bush's candidacy for re-election, or his party affiliation. It simply does not need to. The audience could be counted on to know all that. In short, the district court's test would classify this prominent candidate ad, when run by a non-major purpose entity, as exempt "grassroots lobbying" and allow corporations to run it out of their general treasury funds without any disclosure.

Another ad, *Bear*, from the 1984 presidential contest makes this point even more clearly. One of the most memorable in the campaign, it sought to defuse attacks that President Reagan had unnecessarily escalated military spending. In the ad, a bear, representing the Soviet Union, roams the woods eventually to face a human. The announcer asks whether the bear is threatening and "isn't it smart to be as strong as the bear?"

ANNOUNCER:
There is a bear in the woods.

For some people the bear is easy to see. Others don't see it at all.

Some people say the bear is tame.

Others say it's vicious and dangerous.

Since no one can really be sure who's right, isn't it smart to be as strong as the bear? If there is a bear?

Bear (Reagan), http://livingroomcandidate.movingimage.us/election/index.php?nav_action=election&nav_subaction=overview&campaign_id=173 (left-click on bear photo) (streaming video) (last visited Feb. 20, 2007); http://livingroomcandidate.movingimage.us/election/index.ph

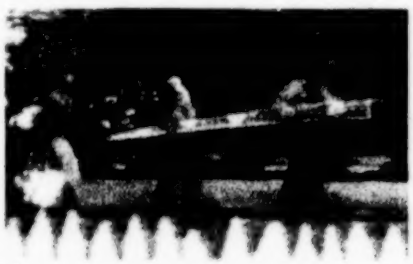
p?nav_action=election&nav_subaction=overview&campaign_id=173 (left-click on bear photo; then left-click on "transcript")(transcript) (last visited Feb. 20, 2007).

This ad too displays all the "magic features" that the district court would have to require of a non-major purpose group. First, unless the district court's four-corners requirement is so vigorous that it would identify the ad's concern as human defense against attack by bears, the ad references a live issue—national defense and, in particular, the proper degree of military preparedness against the Soviet Union. Second, it does not attribute any position on these issues to President Reagan. (It does not need to.) Third, it does not even urge the viewer to contact President Reagan, let alone do anything more than that. Fourth, except possibly for the words "Prepared for Peace," within its four corners the ad does not promote, attack, support, or oppose President Reagan. Although it is unlikely, if only because of vagueness concerns, that these three words alone could deny the ad "grassroots lobbying" status if run by a non-major purpose group, if they did they could simply be dropped with little ill effect. The ad would still be powerful and its intent and effect—to influence voters to favor President Reagan—would be clear.

Prouder, Stronger, Better, known to many as President Reagan's "Morning in America" ad, was one of the most powerful television ads of any election. It still resonates with many and has, in fact, even given its name to the Reagan years. See, e.g., Ben Yagoda, *My Heart Belongs To 'Mother'*, N.Y. Times, May 14, 2006, § 4, at 14 (identifying time period as "morning-in-America Reagan years"). Its imagery of people going to work, moving into their new homes, marrying, and living under lowered inflation all effectively conveyed an upbeat image of American life. One minor deletion and possibly one minor addition, however, would

bring this memorable candidate ad under the district court's "grassroots lobbying" exemption.

ANNOUNCER:
It's morning again in America. Today more men and women will go to work than ever before in our country's history.



With interest rates at about half the record highs of 1980, nearly two thousand families today will buy new homes, more than at any time in the past four years.

This afternoon 6,500 young men and women will be married

and with inflation at less than half of what it was just four years ago, they can look forward with confidence to the future.

It's morning again in America and under the leadership of President Reagan our country is prouder and stronger and better.

Why would we ever want to return to where we were less than four short years ago?

Prouder, Stronger, Better (Reagan), at http://livingroomcandidate.movingimage.us/election/index.php?nav_action=election&nav_subaction=overview&campaign_id=173 (streaming video)(last visited Feb. 20, 2007), http://livingroomcandidate.movingimage.us/election/index.php?nav_action=election&nav_subaction=overview&campaign_id=173 (transcript)(left-click on "transcript")(last visited Feb. 20, 2007).

The ad clearly displays three of the district court's five "magic features." It does not attribute a position on any pending issue to President Reagan; it does not ask viewers to contact him, let alone go beyond that; and it avoids mentioning the election, President Reagan's candidacy, or his political affiliation. The phrase "under the leadership of President Reagan our country is prouder and stronger and better" may, even under the district court's four-corners approach, come uncomfortably close to promotion or support. If so, that could be easily fixed. Dropping the six words "under the leadership of President Reagan," which represent approximately three seconds of the 60-second ad, would avoid any danger of promotion. The only other question is whether the ad references a pending issue. Although it is littered with references to the standard, ever-present concerns of federal economic policy—employment, interest rates,

inflation, and homeownership—not to mention marriage and the family, the focus of much federal social policy, the district court might believe that the ad does not reference with sufficient specificity any pending or near-future issue before the executive branch. If that were the case, the fix again would be simple. A corporation wanting to fund the ad out of its general treasury funds could simply include mention of a more concrete pending issue among these more general ones. No problem here. Within the 60-day "electioneering communications" period of that election, a government shutdown was threatened, see Martin Tolchin, *White House Approval Sought On a Compromise Spending Plan*, N.Y. Times, Oct. 10, 1984, at A1, and the generousness of Social Security was a hot issue, see Francis X. Clines, *Reagan Promises No Benefit Cuts For Any Retirees*, N.Y. Times, Oct. 10, 1984, at A1. Such minor modification would have allowed a corporation to run with funds from its general treasury perhaps the most effective and certainly the most memorable candidate ad from the 1980s.

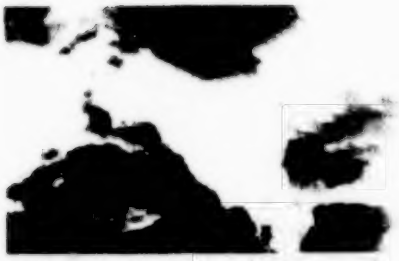
Slight revision would have allowed corporations to similarly fund the most famous example of negative candidate-sponsored advertising: the 1964 Johnson campaign's "Daisy" ad. In this ad, the Johnson campaign powerfully suggested that a Goldwater presidency would lead the country to nuclear destruction. It was so effective that the campaign paid to run it only once. News commentary during the rest of the campaign gave it sufficient life of its own. The ad begins with a little girl counting, as best she can, from one to ten while plucking petals from a daisy. When she gets almost to ten, an ominous male voice replaces hers, counting backwards in a countdown to the ignition of a nuclear bomb. President Johnson's voice, echoing a poem of W.H. Auden, then gives voters the choice: "To make a world in which all of God's children can live, or to go into the darkness."

SMALL CHILD [with flower]: One, two, three, four, five, seven, six, six, eight, nine, nine ....

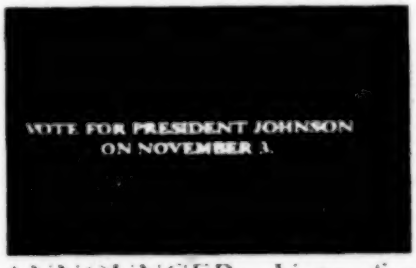
MAN: Ten, nine, eight, seven, six, five, four, three, two, one, zero.

[Sounds of exploding bomb.]

JOHNSON: These are the stakes: To make a world in which all of God's children can live, or to go into the darkness.



We must either love each other, or we must die.



ANNOUNCER: Vote for President Johnson on November 3rd. The stakes are too high for you to stay home.

Peace Little Girl (Daisy) (1964, Johnson). http://livingroomcandidate.movingimage.us/style/index.php?nav_action=style

&nav_subaction=110 (streaming video) (last visited Feb. 20, 2007), http://livingroomcandidate.movingimage.us/style/index.php?nav_action=style&nav_subaction=110 (transcript) (left-click on "transcript")(last visited Feb. 20, 2007).

Two minor changes, neither of which would diminish the power of the ad, would allow a corporation to run it from general treasury funds without any disclosure if the race occurred today. First, someone other than Johnson himself would have to intone the words associated with the fourth and fifth frames. Using Johnson's own voice would make the ads a prohibited "coordinated communication." See 11 C.F.R. 109.21. Second, the words "for President Johnson" would have to be dropped from both the imagery and the voiceover. As express advocacy they would clearly satisfy the PASO factor no matter how the district court ended up construing it to avoid the vagueness concerns attending its application to non-major purpose entities. If a corporation made these two slight changes, neither of which would reduce the ad's effectiveness, the ad would possess all five of the district court's "magic features."

IV. WRTL'S SUGGESTED TEST FOR "GRASSROOTS LOBBYING" WOULD EXEMPT NEARLY ALL ELECTIONEERING COMMUNICATIONS THAT AVOID EXPRESS ADVOCACY.

WRTL has itself not formally proposed a test to identify grassroots lobbying communications. In the district court, however, it approvingly cited the Internal Revenue Service's ("IRS") definition and suggested that that approach should apply here. Mem. in Supp. of Pl.'s Summ. J. Mot. at 22-23, *Wisconsin Right to Life, Inc.* v. *FEC*, No. CV04 1260DBS RWR RJL (D.D.C. Dec. 21 2006). The IRS provides that

> [a g]rass roots lobbying communication is any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof and has three required elements: [It] (A) [r]efers to specific legislation * * *, (B) [r]eflects a view on such legislation, and (C) [e]ncourages the recipient of the communication to take some action with respect to such legislation * * * .

26 C.F.R. 56.4911-2(b)(2)(i)-(ii). As WRTL noted in the district court, "grassroots lobbying" is contrasted to "political intervention," which is more heavily regulated. "Political intervention" is defined as an "exempt function," which

> means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

26 U.S.C. 527(e)(2). Adopting just the IRS's definition of grassroots lobbying, as WRTL's seemed to suggest below, would pose several problems.

First, it would not even fit the facts of this case. Although WRTL repeatedly argues that its ads are intended to influence public opinion on "legislation," they do not do so under the IRS's definition. All three ads take a position on filibustering of judicial nominees. Under the IRS framework, this constitutes restricted "political intervention" since it "attempt[s] to influence the selection * * * or appointment of any individual to any Federal * * * office * * * ." *Id.* The

ads, moreover, do not meet a single one of the definition's requirements for grassroots lobbying. They neither "refe[r] to specific legislation," "reflec[t] a view on such legislation," nor "encourage[e] the recipient of the communication to take some action with respect to such legislation" as the IRS defines it. 26 C.F.R. 56.4911-2(b)(2)(i)-(ii). Filibustering of nominees simply does not concern "legislation" as defined. See *id.* 56.4911-2(d)(1) (defining "legislation"). And, even if it did, WRTL's failure to include any contact information in the ads themselves would independently disqualify them. See *id.* 56.4911-2(b)(2)(iii)(B) (requiring that communication "[s]tate the address, telephone number or similar information of a legislator"). In other words, even the capacious test WRTL suggested below would offer its own ads no protection.

More importantly, the IRS test would exempt from coverage many electioneering communications that are "the functional equivalent of express advocacy," whose funding this Court has found Congress can regulate. *McConnell*, 540 U.S. at 206. Several of the ads Senator McConnell cited as protected issue advocacy in his leading brief in *McConnell*, for example, meet the IRS test. Still more troubling, the one ad this Court cited in *McConnell* as a clear example of sham issue advocacy would pass it as well with one minor emendation. In *McConnell*, this Court noted that although ads avoiding express words of advocacy "do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." *Id.* at 193. In a footnote, it then gave a strong example:

> One striking example is an ad that a group called "Citizens for Reform" sponsored during the 1996 Montana congressional race, in which Bill Yellowtail was a candidate. The ad stated:
>
> "Who is Bill Yellowtail? He preaches family values but took a swing at his wife.

> And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order ... but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values."
>
> The notion that this advertisement was designed purely to discuss the issue of family values strains credulity.

Id. at 193-94 n.78 (internal citations omitted). Even though this Court found the notion that this ad discusses mere issues "strains credulity," the ad itself would be protected as "grassroots lobbying" under the IRS's test if only a reference to specific "family values" legislation and Bill Yellowtail's phone number were added. In that case, it would meet all three parts of the IRS test. It would (1) "refe[r] to specific legislation", (2) "reflec[t] a view on such legislation," and (3) "encourage[e] the recipient of the communication to take some action with respect to such legislation." In other words, the definition WRTL itself proposed below could exempt even the most egregious ads in *McConnell* as "grassroots lobbying."

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

DANIEL R. ORTIZ
Counsel of Record
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW*
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

FEBRUARY 2007

*Affiliation listed for address purposes only.

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Nos. 06-969 & 06-970

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

SENATOR JOHN MCCAIN, ET AL.,

Appellants,

v.

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

On Appeal From
The United States District Court
For The District Of Columbia

BRIEF OF UNITED STATES SENATOR MITCH McCONNELL AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

THEODORE B. OLSON
Counsel of Record
DOUGLAS R. COX
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether the prohibition on corporate disbursements for "electioneering communications" during a statutorily imposed black-out period, codified at 2 U.S.C. § 441b, is unconstitutional as applied to television advertisements that are devoted exclusively to urging constituents to contact named elected officials regarding pending governmental matters.

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Cases (cont'd)

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Continental Congress, Address to the Inhabitants of the Province of Quebec (Oct. 26, 1774), *in* 1 JOURNAL OF THE CONTINENTAL CONGRESS 104 (1904 ed.) 11

Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986) 12

Mitch McConnell, *Healthy Campaigns, Democracy Are Compatible*, THE HILL, July 24, 2002 19

Mitch McConnell, *In Defense of Soft Money*, N.Y. TIMES, Apr. 1, 2001 2

Mitch McConnell, *Speech Limits Are Not Reform*, USA TODAY, Feb. 26, 2002 1

Page(s)

Other Authorities (cont'd)

Mitch McConnell, *Stop Arm-Twisting "Support,"* USA TODAY, Feb. 8, 2007 1

Press Release, Office of the Press Secretary, President Signs Campaign Finance Reform Act (Mar. 27, 2002), *at* http://www.whitehouse.gov/news/releases/2002/03/20020327.html 3

Bradley A. Smith & Jason R. Owen, *Boundary Based Restrictions in Unbounded Broadcast Media Markets:* McConnell v. FEC*'s Underinclusive Overbreadth Analysis*, 18 STAN. L. & POL'Y REV. _ (forthcoming 2007) 14

BRIEF OF UNITED STATES SENATOR MITCH McCONNELL AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether the prohibition on "electioneering communications," codified at 2 U.S.C. § 441b, is unconstitutional as applied to grass-roots lobbying. The First Amendment is essential to the vitality and legitimacy of our political process. *Amicus*—a long-time advocate of First Amendment protection for political speech, and an elected official with a vital personal stake in the health of our political system—has a significant interest in the resolution of this question.

United States Senator Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky and the Senate Republican Leader. He also is the former chairman and a current member of the Senate Rules and Administration Committee, which is the committee responsible for reviewing all proposed legislation related to federal elections. During his four terms in the Senate, Senator McConnell has been one of the Senate's foremost champions of vigorous political debate and has consistently argued that restrictions upon free speech are constitutionally doubtful and will undermine popular participation in government. *See, e.g.*, Mitch McConnell, *Stop Arm-Twisting "Support,"* USA TODAY, Feb. 8, 2007, at 14A; Mitch McConnell, *Speech Limits Are Not Reform*, USA TODAY, Feb. 26, 2002, at 13A;

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief.

Mitch McConnell, *In Defense of Soft Money*, N.Y. TIMES, Apr. 1, 2001, § 4, at 17.

Senator McConnell's strongly held beliefs about the meaning of the First Amendment and the importance of robust political debate led him to challenge the constitutionality of the Bipartisan Campaign Reform Act of 2002 shortly after its enactment. *See McConnell v. FEC*, 540 U.S. 93 (2003). He also has participated as *amicus curiae* in several other cases contesting the validity of restrictions on political speech.[2] Senator McConnell's position as a United States Senator and his extensive experience with campaign finance legislation give him unique insight into the constitutional infirmities presented by the Bipartisan Campaign Reform Act's application to the grass-roots lobbying efforts at issue here.

STATEMENT

1. In 2002, Congress passed, and the President signed, the Bipartisan Campaign Reform Act ("BCRA"), which amended the Federal Election Campaign Act of 1971 ("FECA") to curb corruption or the appearance of corruption in federal elections. *See McConnell*, 540 U.S. at 115 (calling BCRA the most recent federal enactment designed to "purge

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[2] *See* Brief of United States Senator Mitch McConnell as *Amicus Curiae* in Support of Petitioners, Randall v. Sorrell, 126 S. Ct. 2479 (2006) (No. 04-1528); Brief of United States Senator Mitch McConnell as *Amicus Curiae* in Support of Appellant, Wis. Right to Life, Inc. v. FEC, 126 S. Ct. 1016 (2006) (No. 04-1581); Brief of Senator Mitch McConnell, Missouri Republican Party, Republican National Committee, and National Republican Senatorial Committee, as *Amici Curiae* in Support of Respondents, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (No. 98-963); Brief of Washington Legal Foundation, Fair Government Foundation, Allied Educational Foundation; U.S. Senators Alfonse M. D'Amato, Mitch McConnell; U.S. Representatives Henry J. Hyde, Bob Livingston, Joe Barton, Bob Walker; Bill Frenxel and Eugene McCarthy, as *Amici Curiae* in Support of Petitioners, Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) (No. 95-489).

national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions" (internal quotation marks omitted)). When signing BCRA into law, President Bush cautioned that several of its provisions "present serious constitutional concerns." Press Release, Office of the Press Secretary, President Signs Campaign Finance Reform Act (Mar. 27, 2002), *at* http://www.whitehouse.gov/news/releases/2002/03/20020327.html [hereinafter Presidential Signing Statement]. The President expressed specific "reservations about the constitutionality of [BCRA § 203's] broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election." *Id.*

A year later, this Court upheld most of BCRA's provisions, and rejected a facial challenge to BCRA § 203's restrictions on issue advertising. *McConnell*, 540 U.S. at 207. In *Wisconsin Right to Life, Inc. v. FEC*, 126 S. Ct. 1016 (2006), this Court clarified that its decision in *McConnell* did not "resolve future as-applied challenges" to BCRA § 203. *Id.* at 1018. This Court is now squarely confronted with the as-applied constitutional challenge that *McConnell* invited for another day.

2. BCRA § 203 prohibits any corporation from "mak[ing] a contribution or expenditure in connection with any election to any political office, or in connection with any primary election . . . for any political office." 2 U.S.C. § 441b(a). The terms "contribution" and "expenditure" are defined to include "electioneering communications." *Id.* § 441b(b)(2).

An "electioneering communication," in turn, is defined as any broadcast, cable, or satellite communication that (i) refers to any clearly identified federal candidate; (ii) is made within 30 days of a primary or 60 days of a general election; and (iii) is targeted to the electorate of the identified candidate. 2 U.S.C. § 434(f)(3)(A)(i); *see also* 11 C.F.R.

§ 100.29(b)(2) ("[r]efers to a clearly identified candidate means that the candidate's name, nickname, photograph, or drawing appears"). Once these provisions are triggered, a corporation "may not use [its] general treasury funds to finance electioneering communications"; if it intends to run advertisements referring to particular federal officeholders during this black-out period, it must first create a distinct organization—a separate segregated fund (or PAC)—in order to speak. *McConnell*, 540 U.S. at 204; *see also* 2 U.S.C. § 441b(b)(2)(A)-(C).[3] BCRA § 203 thus extended FECA's existing restrictions on "express advocacy," which applied to corporate-funded advertisements that explicitly advocated a candidate's election or defeat, to electioneering issue advertisements, which did not expressly advocate a vote for or against a candidate. *McConnell*, 540 U.S. at 193-94.

In *McConnell*, the parties challenging BCRA's constitutionality argued that § 203's restriction on electioneering communications was substantially overbroad and thus facially unconstitutional. 540 U.S. at 204. The Court rejected this facial challenge because it believed that "the vast majority" of issue ads aired during the weeks immediately preceding an election served an electioneering purpose (*id.* at 206) and that restrictions on such ads were necessary to combat the potentially distorting impact of corporate wealth on elections. *Id.* at 205. The Court explained that the "justifications for the regulation of express advocacy apply equally to [issue] ads aired during those periods *if* the ads are intended to influence the voters' decisions *and* have that effect." *Id.* at 206 (emphases added). The Court recognized that restric-

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[3] Section 441b(b)(2)(C) provides that "the term 'contribution or expenditure' . . . shall not include . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock."

tions on issue ads that are *not* intended to serve an electioneering purpose are constitutionally suspect and are thus amenable to an as-applied challenge. *See id.* at 206 n.88 ("interests that justify the regulation of campaign speech might not apply to the regulation of . . . issue ads" that do not serve an electioneering function).

3. During the summer of 2004, Wisconsin Right To Life, Inc. ("WRTL"), a nonprofit, 501(c) tax-exempt Wisconsin corporation, ran a series of advertisements urging Wisconsin residents to lobby United States Senators Feingold and Kohl to oppose filibusters of judicial nominees. *See* Jurisdictional Statement Appendix ("J.S.A.") at 2a-6a. The filibuster issue was then receiving significant national attention, and there was a vigorous public debate about the judicial confirmation process.

WRTL's lobbying campaign did not refer to the Senators' party affiliations, their general voting records, or their personal lives. *See* J.S.A. at 3a-6a. In fact, the ads mentioned the Senators' names only once, concluding with the suggestion that listeners "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." *See id.* (wording of three filibuster ads). It is undisputed that, because the ads made reference to Senator Feingold, who was then seeking re-election, they fell within the plain terms of BCRA's electioneering communications provisions for approximately a two-and-a-half-month period, beginning August 15, 2004. *See id.* at 6a-7a.[4]

4. On July 28, 2004, WRTL filed suit in the United States District Court for the District of Columbia and sought a preliminary injunction allowing it to continue running the filibuster ads with general treasury funds during the statuto-

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[4] Because Senator Feingold was a candidate in the September 14 primary and the November 2 general election, WRTL was prohibited from running the filibuster ads from August 15 to November 2, 2004.

rily imposed black-out period. *See* J.S.A. at 7a. A three-judge panel, convened pursuant to BCRA § 403(a)(1), denied WRTL's request for injunctive relief, interpreting *McConnell* as precluding all as-applied challenges to BCRA's electioneering communications provisions. *See id.* at 8a.

This Court noted probable jurisdiction and unanimously reversed, concluding that the district court had misinterpreted *McConnell*. *Wis. Right to Life*, 126 S. Ct. at 1018. The Court explained that "[i]n upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges," *id.*, and remanded the case with instructions that the district court consider the merits of WRTL's claims.

5. On remand, the district court granted WRTL summary judgment, holding that BCRA § 203 is unconstitutional as applied to the three anti-filibuster ads that WRTL ran in the period preceding the 2004 election. *See* J.S.A. at 1a-2a. As an initial matter, the court held that WRTL's claim with respect to the three ads is not moot because the difficulty of obtaining judicial review during the brief BCRA blackout period, and WRTL's stated intention of running similar issue ads during future periods, suffice to bring its challenge within the exception for claims "capable of repetition, yet evading review." *See id.* at 11a-15a.

On the merits, the court held that BCRA § 203 cannot be constitutionally applied to issue ads that are neither express advocacy nor its functional equivalent because the government lacks a compelling interest in foreclosing grass-roots advocacy in the period preceding an election. *See* J.S.A. at 16a. The court therefore evaluated the text and images of WRTL's ads to determine whether they evidenced an electioneering purpose or effect. *See id.* at 18a-19a. The court declined, however, to expand its inquiry beyond the "four corners" of the ads, reasoning that it would be unmanageable to conduct an as-applied challenge during the statutorily prescribed blackout period if each case required depositions and

expert testimony regarding the likely impact of an ad and its sponsor's alleged subjective intent. *See id.* at 19a-20a. The court emphasized that "delving into a speaker's subjective intent is both dangerous and undesirable when First Amendment freedoms are at stake." *Id.* at 20a.

The district court listed several factors that it deemed relevant in identifying a constitutionally protected grass-roots lobbying ad—namely, whether the ad

> (1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate.

J.S.A. at 22a. Applying these factors to WRTL's ads, the court concluded that the ads did not serve an electioneering purpose because they addressed judicial filibusters—a pressing matter of public concern—and referred to Senator Feingold, then a candidate for reelection, only in the ads' "call-to-action" line, which exhorted viewers to contact the Senator to express their views on the issue. *See id.* at 23a-24a. The court therefore concluded that BCRA § 203 could not be constitutionally applied to WRTL's ads. *See id.* at 29a.

The United States filed a notice of appeal and a jurisdictional statement, and this Court agreed to hear the case, while postponing further consideration of the question of jurisdiction until the hearing on the merits.

SUMMARY OF ARGUMENT

This case presents the exceptionally important question whether BCRA § 203's restrictions on electioneering communications can be constitutionally applied to grass-roots lobbying ads that do not serve an electioneering purpose. The Court's resolution of this issue should give due regard to the free speech and petition rights embodied in the First Amendment.

In *McConnell*, the Court explicitly acknowledged the serious constitutional concerns that would be raised by the application of BCRA's electioneering communications provisions to grass-roots lobbying activity. *See* 540 U.S. at 206 n.88 ("interests that justify the regulation of campaign speech might not apply to the regulation of . . . issue ads" that do not serve an electioneering purpose); *see also* Presidential Signing Statement (expressing "reservations about the constitutionality of the broad ban on issue advertising"). Because the ability of citizens to express their views and communicate with their elected representatives without restraint is the essence of self-government and rests at the heart of the First Amendment, BCRA § 203's limitations on grass-roots lobbying are unconstitutional.

Political speech rests "[a]t the core of the First Amendment." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). Grass-roots lobbying, a traditional means of influencing governmental action through citizen participation, fits squarely within the scope of core political speech and is also a manifestation of the people's constitutionally protected right to petition the government. To restrict this class of favored speech, the government must establish that the restriction is narrowly tailored to serve a compelling governmental interest.

This demanding level of scrutiny is warranted because political speech underlies every facet of the American system of government. Without robust political debate, the people

cannot govern themselves effectively. Grass-roots lobbying facilitates self-governance by encouraging citizen participation in government and the free exchange of ideas. Open discourse thus serves a consensus-building function, which ensures that the "best" ideas win out in the political marketplace.

The government has not identified a compelling interest sufficient to justify the imposition of BCRA's restrictions on grass-roots lobbying ads during the weeks immediately preceding an election, when constituents are most receptive to political ads and Congress is often at the height of its legislative activity. A generalized concern about protecting the integrity of the election process does not justify imposing restrictions upon grass-roots issue ads because such restrictions do not further the government's asserted anticorruption interest. Grass-roots issue ads are not functionally equivalent to electioneering issue ads because grass-roots issue ads do not urge a candidate's election or defeat, either in appearance or actuality. Indeed, the only link between grass-roots issue ads and elections is the fact that such ads are run during the time frame immediately preceding an election, and that they exhort citizens to contact named elected officials with respect to pending legislative or executive matters. A desire to insulate incumbents from public scrutiny is not a constitutionally adequate basis for restricting debate on issues of political import.

Nor would First Amendment interests be advanced by intrusive judicial scrutiny into the subjective political views of grass-roots lobbyists. The district court was therefore correct that an objective test—one that limits the search for an electioneering purpose and effect to the "four corners" of the ad--is least intrusive and best ensures a speedy resolution to litigation. An inquiry into the subjective intent underlying an ad would not only be unduly burdensome but would also impermissibly intrude upon the speaker's political beliefs.

This Court should consider this case against the backdrop of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Restricting grass-roots lobbying efforts would silence core political speech that is integral to the functioning of our form of government.

ARGUMENT

I. GRASS-ROOTS LOBBYING IS CORE POLITICAL SPEECH.

A. Political speech lies at the heart of the First Amendment's protections, which ensure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Grass-roots lobbying, which includes any effort to persuade the electorate to support or oppose particular legislative or other official action, is essential to the robust political debate that the First Amendment was designed to foster. *See, e.g.*, 26 U.S.C. § 4911(d)(1) (defining "grass roots" lobbying for tax purposes). Such lobbying is a traditional and critical tool through which people disseminate ideas and make their views known to their elected officials.

This Court has long recognized the importance of "preserv[ing] an uninhibited marketplace of ideas in which truth will ultimately prevail," and preventing "monopolization of that market . . . by the Government itself." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). Indeed, "issue-based" speech involving "advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). Debate on issues of public importance ensures that the people, rather than the government, retain primary responsibility for the policy choices made on their behalf. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) ("the First Amendment serves to ensure that

the individual citizen can effectively participate in and contribute to our republican system of self-government").

Constitutional protection for grass-roots lobbying promotes participatory government. Through the dissemination of views on public issues, grass-roots lobbyists help promote public debate and the development of a responsible, informed electorate. *See Thornhill v. Alabama*, 310 U.S. 88, 104 (1940) (First Amendment protection "is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern"); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (same). Informed citizens, in turn, are better able to hold their representatives accountable for unwise or unjust measures that impair the public interest. Indeed, as the Founders were aware, the "ready communication of thoughts between subjects, and its consequential promotion of union among them," render "oppressive officers . . . ashamed or intimidated into more honourable and just modes of conducting affairs." Continental Congress, Address to the Inhabitants of the Province of Quebec (Oct. 26, 1774), *in* 1 JOURNAL OF THE CONTINENTAL CONGRESS 104, 108 (1904 ed.), *quoted in Thornhill*, 310 U.S. at 102.

WRTL's grass-roots issue ads fit squarely within this constitutional tradition because they were designed to raise awareness among Wisconsin voters of the Senate's filibuster of judicial nominees and to urge constituents to contact the very people who could bring the filibuster to a close—their U.S. Senators.

The right to engage in grass-roots lobbying activity also finds specific textual support in the First Amendment right "to petition the Government for a redress of grievances," U.S. CONST. amend. I, which this Court has deemed "one of the most precious of the liberties safeguarded by the Bill of Rights." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (internal quotation marks omitted). The right to peti-

tion—coupled with the freedoms of association and assembly also protected by the First Amendment—renders the government accountable to the people by providing citizens with the ability to make their views known to their elected officials. Indeed, the "very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

The freedom to petition is distinct from the right of the people to choose their representatives through periodic elections. *See* Stephen A. Higginson, *A Short History of the Right To Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 162 (1986) (noting "the citizenry's two constitutional means of approaching the government: periodic election and continual instruction through petitioning"). While the right to vote ensures that the people can replace ineffectual leaders with others who would better represent them, elections are necessarily episodic. Popular participation in government, however, does not only occur during an election cycle, because the Founders provided the people with the right to petition, which is an independent and ever-present check on the arbitrary exercise of power. It "not only assure[s] popular control of government, but also attach[es] to each citizen responsibility for the nation's laws." *Id.*

B. Because robust political speech is essential to republican government, this Court has applied the most exacting judicial scrutiny to attempts to burden such expression. *See FEC v. Mass. Citizens for Life, Inc. ("MCFL")*, 479 U.S. 238, 256 (1986) ("When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest."). This scrutiny is applied whenever a regulation's "practical effect . . . is to make engaging in protected speech a severely demanding task," even if the law permits speech by those who comply with the government's directives. *Id.* If the government identifies a compelling interest, the regula-

tion must still be "closely drawn to avoid unnecessary abridgement" of speech. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (internal quotation marks omitted). The severe constraints that BCRA § 203 imposes on grass-roots lobbying in the weeks preceding a federal election cannot survive this stringent scrutiny.

To be effective, grass-roots lobbyists must be able to communicate their message during the times best suited to achieving their political objectives. Indeed, "[u]rgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed." *McIntyre*, 514 U.S. at 347; *see also Mills v. Alabama*, 384 U.S. 214, 219 (1966) (holding unconstitutional a state law that prohibited election-day speech because the law "silence[d] the press at a time when it can be most effective"). BCRA § 203 prohibits airing grass-roots lobbying ads that fall within its definition of "electioneering communications" at the time when the public will be most receptive to political ads and legislators will be most likely to pay heed to their constituents' guidance—the weeks leading up to a federal election. *See, e.g., McConnell v. FEC*, 251 F. Supp. 2d 176, 793 n.98 (D.D.C. 2003) (Leon, J.) (listing "important, and controversial, pieces of legislation" before Congress in the 60 days prior to the 2002 midterm elections). Indeed, by targeting messages concerning incumbent officials who are facing reelection, BCRA § 203 prevents grass-roots lobbying directed at those politicians most likely to be sensitive to constituent concerns. The First Amendment, however, prohibits the government from regulating issue-based speech merely because it may prove influential. *See Bellotti*, 435 U.S. at 791-92. The government cannot insulate itself from criticism on public issues at the very moment when that criticism will be most keenly felt.

The realities of the presidential primary season and multi-state media markets exacerbate the problems that advocacy groups face in airing grass-roots lobbying ads prior to

an election. Because each State holds a presidential primary or caucus for both major parties, followed by the general election in November, the total BCRA blackout period for presidential nominees could exceed 120 days in every State. *See* Bradley A. Smith & Jason R. Owen, *Boundary Based Restrictions in Unbounded Broadcast Media Markets: McConnell v. FEC's Underinclusive Overbreadth Analysis*, 18 STAN. L. & POL'Y REV. __ (forthcoming 2007). Moreover, because television networks in large metropolitan areas often serve more than one State, such stations may need to observe longer blackout periods due to staggered state primaries. *See id.* Although these restrictions are most severe for national candidates, they are by no means so limited (as the facts of this case illustrate). Indeed, BCRA § 203 restricts, for example, the ability of an advocacy group to run an issue ad in the D.C. media market that names the sponsors of a bill or committee members conducting a hearing, if the network also serves a State where the named incumbents are facing reelection. *See id.*

The alternatives offered by appellants do not provide adequate channels for effective grass-roots lobbying. For example, it will often not suffice for an advocacy group to run an ad omitting the name of a candidate. This is particularly true when the purpose of an ad is to spur the electorate to action by convincing constituents to contact their elected representatives about a specific political issue. *See McConnell*, 251 F. Supp. 2d at 794 (Leon, J.) (citing expert testimony stating that "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question" (alterations in original)). The name of a candidate may also be indispensable when a piece of legislation is closely associated with a particular person (*e.g.*, "McCain-Feingold") or when mentioning a candidate helps the viewer remember the message of the ad. *See id.* For example, WRTL's ads dealt with fili-

busters and judicial confirmations, which some members of the public may not know are issues within the exclusive province of the Senate. By asking the viewer to contact Senators Feingold and Kohl, the ads connect familiar names with the issue and with the legislative body responsible for resolving it. An ad omitting those names would have left a much more fleeting impression on viewers.

Nor does it suffice to save BCRA § 203 from unconstitutionality that grass-roots lobbyists may run an issue ad during the statutorily prescribed "blackout" period by using PAC money. As this Court has recognized, PAC regulations "impose administrative costs that many small entities may be unable to bear," creating a disincentive for those organizations to engage in political speech at all. *MCFL*, 479 U.S. at 254. Indeed, the FEC's "Campaign Guide for Corporations and Labor Unions" is more than 115 pages long (http://www.fec.gov/pdf/colagui.pdf), and the federal regulations governing PACs are equally extensive. *See* 11 C.F.R. pt. 102. In addition, more than thirty years of precedent governing PACs are embodied in FEC advisory opinions and enforcement actions. Confronted with the specter of substantial administrative fines for violations of these complex regulatory requirements, advocacy groups must generally retain not only an election lawyer but also an accountant to ensure regulatory compliance. These are costs that many groups simply cannot afford, especially because they must also invest in expensive computer equipment and software to comply with the FEC's electronic filing requirements for PAC disclosures.

Moreover, "the reporting and disclosure requirements [for PAC donors] will deter some individuals who otherwise might contribute," *MCFL*, 479 U.S. at 254 n.7 (internal quotation marks omitted), and it is therefore more difficult for corporations and nonprofit organizations to raise PAC money than general treasury funds WRTL understandably desires to use its scarce PAC resources to fund "express advocacy,"

or campaign-related speech. WRTL and similarly situated groups should not have to choose between exercising their First Amendment right to engage in electioneering or their First Amendment right to pursue grass-roots lobbying campaigns in the critical weeks before a federal election.[5]

Furthermore, WRTL's PAC is "a separate legal entity . . . that engages in independent political advocacy." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 196 (1981). Use of a PAC would prevent WRTL from running an issue ad in its own name. In addition, since organizations create PACs to solicit money for campaign-related speech, and the FEC requires a disclaimer on each ad funded by a PAC, BCRA § 203 compels grass-roots lobbyists to create ads carrying the PAC label for speech that is unrelated to any election. Ironically, in such cases, the law requires an issue-advocacy group to create an ad that, while intended only to address an issue of public concern, carries on its face a label suggesting an electioneering purpose.

Perhaps recognizing the weakness of its arguments on the merits, the United States makes the unprecedented claim that WRTL bears the burden of proof in an as-applied constitutional challenge to BCRA § 203. U.S. Br. 32. On the contrary, it is well-established that, "[e]specially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, the State may prevail only upon showing a subordinating interest which is compelling." *Bellotti*, 435 U.S. at 786 (internal quotation marks and footnote omitted). The "burden is on the *Gov-*

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[5] The importance of preserving the right to engage in grass-roots lobbying unencumbered by governmental burdens is reflected in the Senate's recent vote to remove a provision from the Lobbying Transparency and Accountability Act of 2007 that would have required the public disclosure of paid efforts to stimulate grass-roots lobbying. S. 1, 110th Cong. § 220. The amended bill passed the Senate by a vote of 96-2.

ernment to show the existence of such an interest." *Id.* (emphasis added; internal quotation marks omitted). For example, in *MCFL*, a nonprofit corporation brought an as-applied challenge to the provision of FECA requiring corporations to use a PAC to fund independent expenditures for express advocacy. *See* 479 U.S. at 241. In considering the claim, the Court carefully scrutinized each of the rationales that the United States offered in defense of the PAC requirement, and concluded that none of them justified the onerous burdens imposed on MCFL's freedom of speech. *See id.* at 256-63. This analysis would have been entirely beside the point if, as the government now argues, MCFL had borne the burden of establishing its entitlement to an exemption from a facially valid law. The government's test turns the traditional burden of proof in First Amendment cases on its head.[6]

C. The government cannot demonstrate a compelling interest that adequately justifies the significant burdens that BCRA § 203 imposes on grass-roots lobbying.

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[6] The United States also asks this Court to adopt a novel standard for determining whether a case falls under the "capable of repetition, yet evading review" exception to mootness: namely, that WRTL must show that it intends to run ads in the future that share "*the particular characteristics* that the district court found legally dispositive." U.S. Br. 25 (emphasis added). This standard is plainly incorrect. The practical effect of requiring grass-roots lobbyists to demonstrate that they anticipate reoccurrence of the precise factual circumstances before the court would be to prevent the adjudication of *any* as-applied challenge to BCRA § 203 and to insulate that provision from constitutional scrutiny. J.S.A. at 14a. Under this Court's precedent, WRTL need only demonstrate that there is a "reasonable expectation" that it will be subject to the "same action" again. *Belotti*, 435 U.S. at 774 (internal quotation marks omitted). As the intervenor-appellants concede, WRTL easily satisfies this burden, "particularly in light of more recent attempts by WRTL to finance electioneering communications with its general treasury funds." McCain Br. 13 n.8.

The government does not have the same compelling interest in regulating grass-roots lobbying as it does in regulating true electioneering. Congress enacted the "electioneering communications" provisions in BCRA to protect the integrity of electoral politics against "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). There is no comparable concern that corporations or nonprofits will use grass-roots lobbying—which is designed to foster discourse between the people and their elected representatives, rather than to further a campaign for political office—to exercise undue influence over elections. *See McConnell*, 540 U.S. at 206 n.88 ("we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads"); *Bellotti*, 435 U.S. at 790 ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present" in an effort to influence the outcome of a state referendum).

Grass-roots lobbying ads that merely advise voters to contact their elected representatives to express their views on a particular issue contribute neither to actual corruption nor to its appearance. As the district court explained, the "common denominator between express advocacy and its functional equivalent . . . is the link between the words and images used in the ad and the fitness, or lack thereof, of the candidate for public office." J.S.A. at 27a. The government has no legitimate interest in regulating speech under BCRA § 203 if that speech is directed at an issue of public concern and is silent on the suitability of the named candidate for office.

Indeed, the regulation of genuine issue advocacy actually impairs the government's interest in ensuring fair and equal opportunity for citizens to participate in the electoral process. While the use of corporate money in elections may create perceived imbalances of political power, the free and

open exchange of ideas on issues of political importance is a principal guarantor of equality in participatory government. *See McIntyre*, 514 U.S. at 348 n.11 ("the best test of truth is the power of the thought to get itself accepted in the competition of the market" (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))). The government is therefore wrong to suggest that regulation of issue advocacy is necessary to prevent corruption in elections; "healthy campaigns and a healthy democracy are not in conflict with the First Amendment, but contingent upon it." Mitch McConnell, *Healthy Campaigns, Democracy Are Compatible*, THE HILL, July 24, 2002, at 30.

In *McConnell*, this Court recognized that there might be examples of classes of speech that Congress could not constitutionally regulate under BCRA § 203 and that the "justifications for the regulation of express advocacy apply equally" to issue ads only "*if* the ads are intended to influence the voters' decisions *and* have that effect." 540 U.S. at 206 & n.88 (emphases added). The Court should now make clear that BCRA § 203 is unconstitutional as applied to grass-roots lobbying because the government lacks a compelling interest in restricting political speech that does not have the purpose or effect of influencing an election.

II. IN EVALUATING WHETHER A GRASS-ROOTS LOBBYING COMMUNICATION IS CONSTITUTIONALLY PROTECTED, COURTS SHOULD CONSIDER ONLY THE "FOUR CORNERS" OF THE AD.

Appellants urge this Court to endorse an open-ended, subjective inquiry that would empower judges to scrutinize the full panoply of a speaker's political views and activities to determine whether a facially authentic issue ad "truly" constitutes grass-roots lobbying. The substantial litigating burdens associated with appellants' proposed test would have a significant chilling effect on the grass-roots advocacy of

groups unable to divert their finite resources to fund a lengthy court battle with the government. Appellants' test also disregards the fact that advocacy groups like WRTL are often interested in influencing both legislative activities and the outcome of elections, and that they have a wide variety of constitutionally protected tools at their disposal to further their various political objectives. *See Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects [speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."). To that end, advocacy groups organize community events to educate the public about important issues, propose and draft new legislation, establish and utilize PACs for electioneering purposes, and run issue-specific grass-roots lobbying ads to support or oppose particular legislative proposals. The test advocated by appellants would impermissibly burden the grass-roots lobbying rights of those organizations that also engage in express electioneering activities.

The district court therefore properly confined its inquiry to the text and images of WRTL's ads. This objective standard for identifying grass-roots lobbying safeguards the government's interest in preventing corruption and preserving the integrity of the electoral process. An invasive, subjective inquiry, on the other hand, would chill constitutionally protected speech and unnecessarily burden the judicial process.

A. The subjective standard for identifying grass-roots lobbying urged by appellants would require intrusive inquisitions into the thoughts and beliefs of the officers and directors of grass-roots lobbying organizations to determine the "true" motivation behind their ads. The prospect of having to disclose one's political affiliations and electoral preferences by deposition or testimony in the course of a lawsuit is almost certain to deter "the uninhibited, robust, and wide-open debate and discussion that are contemplated by the First Amendment." *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (internal quotation marks omitted). This will be

particularly true for small, comparatively unsophisticated groups that engage in grass-roots lobbying. When confronted with burdensome regulation and the possibility of intrusive litigation, "it would not be surprising if at least some [smaller] groups decided that the contemplated political activity was simply not worth it." *MCFL*, 479 U.S. at 255. The members of political associations should not have to endure such invasive judicial inquiries in order to exercise their fundamental First Amendment rights. *See* J.S.A. at 20a ("delving into a speaker's subjective intent is both dangerous and undesirable when First Amendment freedoms are at stake").

The district court also noted the significant practical consequences of adopting a subjective test. An inquiry into the intentions underlying an ad would entail lengthy discovery and trial testimony, and would make it virtually impossible for issue advocates to mount a successful as-applied challenge within the limited time frame of the BCRA blackout period. *See* J.S.A. at 19a. Indeed, a subjective test would make it very difficult for political associations to structure their future conduct with any degree of certainty, as the government could conceivably introduce a written or oral statement of any member of the organization as proof of hidden electioneering intent. *See Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (noting that a subjective intent test "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning" (internal quotation marks omitted)). To ensure compliance with BCRA § 203, advocacy organizations would need to consult closely with lawyers in developing their grass-roots lobbying campaigns—a cost that many groups would be unable to absorb and that would compel such groups to forgo grass-roots lobbying altogether. The subjective approach advocated by appellants would thus inevitably result in the suppression of a significant amount of constitutionally protected speech.

Moreover, this Court has made clear that First Amendment protection cannot depend on the identity of the speaker. *See Bellotti*, 435 U.S. at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . ."). Indeed, the First Amendment forbids regulation of speech "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Despite this well-established prohibition on "viewpoint discrimination," appellants ask this Court to determine whether WRTL's ads constitute grass-roots lobbying by parsing its press releases, e-alerts, voter guides, and the full content of its former website, "befair.org," for evidence that WRTL supports or opposes the candidate named in the ad. *See, e.g.*, McCain Br. 25, 27, 42.[7] These materials and other public pronouncements made by nonprofit groups like WRTL will often reveal the electoral preferences of the speaker; they do not, however, transform grass-roots lobbying into the functional equivalent of express advocacy.

Participants in the political marketplace may use a variety of methods to achieve their policy aims, and each method is suited to accomplish a particular result. It is undisputed

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[7] Appellants place considerable weight on the content of WRTL's website, "befair.org," and the exhortation in the ads to visit the site for more information. Directing viewers to the website makes perfect sense: It will almost always be easier for viewers to remember the name of a website than a telephone number or address mentioned briefly at the end of an ad. While the full content of the site contains examples of campaign-related speech (as well as contact information for the Senators), this will be true of any advocacy group that engages in both electioneering and lobbying activities, and that uses a website as a clearinghouse for its various activities. Appellants' blunderbuss approach to the analysis of an ad threatens to strip issue-based speech of constitutional protection whenever a political association that runs issue ads publicizes its electioneering activities on the same website that promotes its issue advocacy campaign.

that one of WRTL's top legislative priorities in 2004 was to end the filibuster of President Bush's judicial nominees. WRTL chose to conduct a grass-roots lobbying campaign to increase citizen awareness of the issue and encourage constituents to make their voices heard by contacting their elected representatives. Regardless of whether WRTL also engaged in electioneering activity, BCRA § 203 cannot be constitutionally applied to WRTL's grass-roots lobbying. *See, e.g., E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) (holding that the constitutional right to petition precluded application of the Sherman Act "to the activities of the railroads . . . insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws"). If this Court adopted appellants' test, it would be difficult, if not impossible, for a nonprofit entity that engaged in an array of political activities, including electioneering, to avoid the suspicion that its grass-roots lobbying campaigns were a veiled attempt to influence an election.[8]

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[8] The "four corners" approach adopted by the district court does not, as the United States suggests, reintroduce *Buckley*'s "magic words" test. *See* U.S. Br. 38. Rather, it instructs courts to look to the text and images of an ad to determine if the ad, when considered as a whole by a reasonable viewer, "promotes, attacks, supports, or opposes the named candidate," or otherwise indicates that it is the functional equivalent of express advocacy. *See* J.S.A. at 22a. This approach is hardly novel. Indeed, courts routinely exclude extrinsic evidence in statutory or contractual interpretation because the text of the document itself is the most reliable evidence of the author's meaning. *See, e.g., W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991) ("[W]e do not permit [statutory text] to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process."); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 284 (1990) ("At common law and by statute in most States, the parol evidence rule prevents the variations of the terms of a written contract by oral testimony.").

B. The district court properly applied its objective inquiry to WRTL's ads. Those ads refer on their face to judicial filibusters—a pressing issue of public concern—and evidence no electioneering intent. The ads mention the Senators from Wisconsin only in the "call-to-action" line, do not praise or criticize them politically or personally, and do not refer to their voting records on the filibuster issue. *See* J.S.A. at 3a-6a. Indeed, WRTL's inclusion of the names of both Wisconsin Senators—one of whom, Senator Kohl, was not running for reelection in 2004—strongly suggests that the purpose of the ads was to influence legislative behavior, not electoral outcomes.

Because no reasonable viewer could interpret these facially neutral ads as an attempt to influence an election, Congress lacks a constitutionally sufficient basis to suppress that political speech.[9]

* * *

A grass-roots lobbying campaign that urges the electorate to contact its elected representatives to effect policy change does not raise the corruption concerns that Congress contemplated when it enacted BCRA's "electioneering communication" provisions. On the contrary, grass-roots lobbying fosters broad-based participation in public affairs and en-

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[9] Appellants urge this Court to reject WRTL's proposed test for identifying constitutionally protected grass-roots lobbying ads and to adopt instead a broader, subjective standard. *See* U.S. Br. 29-32. The need for any such test, however, is a direct consequence of this Court's decision in *McConnell* upholding BCRA § 203's facial constitutionality. *See* 540 U.S. at 206. The government should not be permitted to silence core political speech merely because, under the legal framework created by Congress and upheld in part by this Court, the lower courts may have to confront some difficult borderline cases. Indeed, the Court could reduce the number of difficult cases by holding that, in the event of doubt, First Amendment principles should prevail and constitutionally protected speech should be allowed to proceed.

hances government accountability. Indeed, the United States concedes that "some corporations are engaged in legitimate issue advocacy designed to urge changes in the law rather than to affect federal elections," and that BCRA "may occasionally capture advertisements that demonstrably lack any electoral purpose or effect." U.S. Br. 49. Without a compelling state interest—which is demonstrably lacking here—Congress cannot regulate such political speech because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

Ultimately, appellants seem to believe that it is more expedient to prohibit all speech that falls within BCRA § 203's broad definition of "electioneering communications," rather than to permit case-by-case adjudication of the purpose and effect of particular ads. However, "the desire for a bright-line rule . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL*, 479 U.S. at 263 (emphasis in original). Indeed, the notion that the First Amendment ceases to operate when it "become[s] inconvenient or when expediency dictates otherwise is a very dangerous doctrine [that] would . . . undermine the basis of our government." *Reid v. Covert*, 354 U.S. 1, 14 (1957). Legislation, however well-intentioned, may not intrude on the basic liberties that make republican government possible.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
DOUGLAS R. COX
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

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Nos. 06-969 & 06-970

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC.,
Appellee.

SENATOR JOHN MCCAIN, ET AL.,
Appellants,

v.

WISCONSIN RIGHT TO LIFE, INC.,
Appellee.

On Appeals from the United States District Court for the District of Columbia

BRIEF OF NATIONAL ASSOCIATION OF REALTORS® AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

LAURENE K. JANIK
RALPH W. HOLMEN
NATIONAL ASSOCIATION OF REALTORS®
430 North Michigan Ave.
Chicago, IL 60611-4087
(312) 329-8375

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for National Association of REALTORS®

March 23, 2007

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INTEREST OF *AMICUS CURIAE*[1]

Amicus the National Association of REALTORS® ("NAR")[2] is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real-estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,500 local Associations of REALTORS®, and approximately 1.3 million REALTOR® and REALTOR-ASSOCIATE® members.

NAR represents the interests of real-estate professionals and real-property owners in important matters before the legislatures, courts, and executives of the federal and state governments. The issues presented in those matters include fair-lending practices, equal opportunity in housing, real-estate licensing, neighborhood revitalization, housing affordability, and cultural diversity. NAR has previously participated as *amicus curiae* in numerous cases before this Court, including, *e.g.*, *Watters v. Wachovia Bank, N.A.*, No. 05-1342 (argued Nov. 29, 2006); *Rapanos v. United States*, 126 S. Ct. 2208 (2006); *Lincoln*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this brief. Appellants in No. 06-970 have filed a letter with the Clerk granting blanket consent to any party filing an *amicus* brief, and letters reflecting the consent of appellant Federal Election Commission (No. 06-969) and appellee Wisconsin Right to Life, Inc. (Nos. 06-969 & 06-970) to the filing of this brief have been filed with the Clerk.

[2] REALTOR® is a federal registered collective membership mark used by members of NAR to indicate their membership status.

Property Co. v. Roche, 546 U.S. 81 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Yee v. City of Escondido*, 503 U.S. 519 (1992).

NAR engages in a variety of federal legislative and political activities intended to advance the interests of its members by improving the legal climate in which the members conduct their businesses. Those activities include financing communications to educate NAR members and the general public about legislation and other matters pending in Congress that may impact the real-estate industry. Those communications may specifically identify members of Congress and call on them to support or oppose legislation, and they may encourage viewers to contact the specified members of Congress to take a particular position. For example, NAR has paid for advertisements promoting legislation to preserve the ability of neighborhood real-estate professionals to serve local communities. Those communications, which share features of the three advertisements at issue here, are intended to influence the adoption or defeat of legislation, and are not intended to influence the election or defeat of any candidate for federal office.

Although NAR maintains a PAC (the REALTORS® Political Action Committee), the extensive regulations and fundraising constraints imposed on PACs (*see* 11 C.F.R. pt. 102[3]) make it unduly burdensome for NAR both to use PAC contributions to support federal candidates, as required by the Federal Election Campaign Act of 1971, 2 U.S.C. § 441b(a), (b)(2)(C), and at the same time to pay for its legislative advocacy through its PAC. Further, NAR

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[3] *See also FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 253-54 (1986) ("*MCFL*") (plurality) (detailing requirements imposed on PACs).

cannot satisfy the requirements for the constitutional exemption to federal regulations of independent expenditures that this Court established in *MCFL* because many of its members pay their membership dues with corporate funds. *See* 479 U.S. at 264 (exempt corporation must not accept contributions from business corporations). Significantly, that is true even though most of NAR's members are local, independent real-estate brokers who do not possess the "immense aggregations of wealth" with which this Court has expressed concern. *McConnell v. FEC*, 540 U.S. 93, 205 (2003) (internal quotation marks omitted).

NAR files this *amicus* brief for two principal reasons. *First*, this case is critically important to NAR's continuing ability to express the views of real-estate professionals and real-property owners on federal legislation. The Federal Election Commission ("FEC") seeks to use the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), and this Court's decision in *McConnell* essentially to shield incumbent legislators from all grass-roots lobbying for the critical three-month period before any national election. The FEC has justified that result using both BCRA's prohibition on "electioneering communications" by corporate bodies (2 U.S.C. § 441b(b)(2)) and a recently expanded application of federal restrictions on so-called "express advocacy."

Second, NAR files this brief to provide the Court with additional context in which to consider appellee's as-applied challenge to BCRA § 203. NAR provides examples of the grass-roots lobbying advertisements that it has sponsored and hopes to continue to sponsor. Those advertisements, which are described in greater detail below, represent quintessential exercises of the rights of speech, petitioning, and association – an association of professionals petitioning members of Congress to support a piece of federal legislation, and urging concerned citizens to do likewise. However the Court resolves appellee's as-applied challenge (and it should be sustained), the Court should recognize – like BCRA's own sponsors have – that

genuine issue ads do exist and the First Amendment protects them.

STATEMENT

The developments in electoral campaigns and their regulation that led to the statutory provision at issue here began in 1974, when Congress passed a law limiting the ability of individuals and groups to communicate their views on candidates for federal office.[4] That law restricted both "the giving and spending of money in political campaigns." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam). This case involves a restriction on spending.

In *Buckley*, this Court held that restrictions on campaign spending burden the exercise of rights of speech and association, triggering "exacting scrutiny" under the First Amendment. *See id.* at 19-20, 22-23, 39, 44-45. In addressing disclosure requirements for independent expenditures, the Court interpreted the vague statutory term "expenditure" (which was defined to include spending "for the purpose of . . . influencing" a federal election) to apply only to "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate" for federal office. *Id.* at 80 (footnote omitted). The First Amendment compelled that interpretation because the language as drafted threatened unconstitutionally to chill speech on "public issues involving legislative proposals and governmental actions." *Id.* at 42; *see id.* at 42-44, 76-80. The law at issue in *Buckley* also limited spending by groups, but no party challenged that aspect of the statute. *See McConnell v. FEC*, 540 U.S. 93, 122 (2003). The Court's narrowing interpretation of the disclosure provision was later applied to the group expenditure limitations as well. *See id.* at 126; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-49 (1986) ("*MCFL*"). Before BCRA, therefore, federal law prohibited corporations and unions from making expenditures on

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[4] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

such forms of expression as television advertisements that expressly advocated the election of a candidate or the defeat of her opponent.[5] *See McConnell*, 540 U.S. at 203; *MCFL*, 479 U.S. at 249; 2 U.S.C. § 441b (2000).

In the years preceding BCRA's enactment, Congress concluded that candidates' supporters were circumventing that spending restriction by paying for ads that were intended to and did function as candidate advertising but eschewed the words of express advocacy (which were generally limited to words like "vote for"). *See McConnell*, 540 U.S. at 126-28. Instead of expressly telling the viewer to vote for or against a particular candidate, the ads would instead take the form of "so-called" or "sham" issue ads – for example, an ad "that condemned [candidate] Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.* at 126-27, 132.

In part to address that problem of "candidate advertisements masquerading as issue ads," *id.* at 132 (internal quotation marks omitted), Congress enacted BCRA. As interpreted by this Court, § 203 prohibits corporations from using their general treasury funds to pay for any "electioneering communication." 2 U.S.C. § 441b(b)(2); *see McConnell*, 540 U.S. at 203-04 & n.87. Section 201, in turn, defines an "electioneering communication" as any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is broadcast within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running for office. 2 U.S.C. § 434(f)(3).

In *McConnell*, this Court rejected a facial challenge to the constitutionality of those provisions. *See* 540 U.S. at

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[5] *See generally FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 490 (1985) ("On the record before us, these expenditures were 'independent' in that they were not made at the request of or in coordination with the official Reagan election campaign committee or any of its agents.").

189-94, 203-09. Several plaintiffs in that case contended, among other things, that § 203 was overbroad because the compelling government interest justifying regulation of express candidate advocacy did not apply "to significant quantities of speech encompassed by the definition of electioneering communications." *Id.* at 206. According to the Court, that contention "fail[ed] *to the extent that* the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *Id.* (emphasis added). It further stated that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." *Id.* This case presents the question *McConnell* left open – namely, whether § 203's prohibition on "electioneering communications" can constitutionally be applied to an ad that is not "the functional equivalent of express advocacy."

SUMMARY OF ARGUMENT

A. Wisconsin Right to Life, Inc. ("WRTL") seeks to sponsor broadcast communications advocating positions on matters pending before Congress and urging citizens to contact their members of Congress about those matters. NAR believes that it should be able to engage in similar legislative advocacy. Legislative advocacy of the type that WRTL and NAR seek to conduct (which is referred to as grass-roots lobbying) implicates the First Amendment's protections for speech, petitioning, and association. BCRA § 203, which prohibits corporate grass-roots lobbying of incumbent candidates for 30 days before a primary and 60 days before a general election, burdens all three of those First Amendment protections. Although this Court has recognized a compelling government interest in limiting corporate spending on electoral advocacy, it has not recognized a similar interest in limiting corporate speech addressing legislative affairs. Because no compelling interest justifies BCRA § 203's burdens on true legislative

advocacy, that provision is unconstitutional as applied here.

B. The FEC and the intervenors contend, however, that the compelling government interest in restricting corporate electoral spending justifies prohibiting grass-roots lobbying during the pre-election period. But communications like those that NAR desires to fund are not the functional equivalent of express candidate advocacy, and their regulation therefore cannot be defended on that ground.

C. In criticizing the district court's conclusion that the First Amendment precludes BCRA § 203's application to WRTL's planned advertisements, the FEC asserts that WRTL, and other similarly situated speakers challenging the application of BCRA § 203 to their speech, cannot prevail on an as-applied challenge to § 203 unless it articulates a legal test to govern future as-applied challenges. But nothing justifies imposing such a requirement on speakers such as WRTL.

D. The FEC and the intervenors also criticize the district court for giving insufficient weight to purported contextual facts – such as separate statements made by WRTL (or other individuals and groups) about the upcoming election. The wide-ranging inquiry that the FEC and the intervenors urge conflicts with the approach that this Court took in *McConnell* and penalizes one speaker for the statements of others.

E. In asserting that BCRA imposes a tolerable burden on First Amendment freedoms, the FEC and the intervenors rely on the fact that BCRA's definition of electioneering communications does not include print or other non-broadcast advertisements. But the availability of those avenues of expression is not as clear as the FEC and the intervenors suggest. The FEC recently has taken an aggressive interpretation of its ability to prohibit corporate funding of non-broadcast advertisements that the FEC contends contain express electoral advocacy by considering amorphous contextual factors – an approach that

significantly threatens to chill legitimate and constitutionally protected speech.[6]

ARGUMENT

BCRA § 203 IS UNCONSTITUTIONAL AS APPLIED TO TRUE LEGISLATIVE ADVERTISING

The district court correctly held that BCRA's prohibition on "electioneering communications" cannot constitutionally be applied to "genuine issue ads" – that is, ads that are neither "express advocacy" nor "its functional equivalent." J.S. App. 17a. As applied here, BCRA burdens the exercise of fundamental First Amendment freedoms, and the compelling government interest in regulating corporate speech on candidate elections does not apply to true legislative advertising.

A. No Compelling Government Interest Justifies BCRA § 203's Burden On First Amendment Rights

This case involves the ability of corporations (both for-profit and not-for-profit) to engage in grass-roots lobbying. Grass-roots lobbying is designed to inform members of the public about important legislative or public-policy issues and to express a particular view about those issues. Such efforts often seek to motivate constituents to contact their elected officials about those issues. It typically takes the form of advertisements advocating a position on a pending issue and recommending that viewers contact their political representatives and urge them to support that position.[7]

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[6] The FEC also contends that this case is moot. This Court postponed to the hearing on the merits further consideration of the question of jurisdiction in these cases. *See* Order (Jan. 19, 2007). NAR agrees with WRTL and the intervenors (*see* Appellants Br. 13 n.8) that this case is not moot because, as the district court explained, it is capable of repetition, yet evading review. *See* J.S. App. 11a-15a. (References to "J.S. App." are to the Appendix to the Jurisdictional Statement filed by the FEC in No. 06-969.)

[7] *See, e.g., McConnell v. FEC*, 251 F. Supp. 2d 176, 793 (D.D.C.) (Leon, J.) (describing "genuine issue advertisements . . . , the sole

In this case, for example, WRTL sought to sponsor broadcast communications criticizing the Senate's conduct of (or failure to conduct) a constitutional function – advising on and consenting to the President's judicial nominees (*see* U.S. Const. art. II, § 2, cl. 2). *See* J.S. App. 3a-6a & nn.3-5. Those communications would have expressed the collective concern of WRTL's adherents that the failure to confirm judges impaired the judiciary's functioning and would have urged recipients of the communications to contact their Senators and express disapproval of the practice of filibustering to prevent a confirmation vote on judicial nominees. *See id.*

NAR has paid for analogous advertisements promoting its views on behalf of its member real-estate professionals, as well as real-property owners, on pending federal legislation. For example, NAR has sponsored advertisements with the following messages:

> *Congressman Ferguson*
> *please cosponsor*
>
> H.R. 3424 – "The Community Choice in Real Estate Act"
>
> ***A COMMITMENT TO***
> ***OUR COMMUNITY***
>
> America was built by people following a dream, starting small businesses and building communities – by people working together in communities volunteering to enhance our quality of life. They have made America into the great country it is today.
>
> Legislation has been introduced that will preserve our local communities, preserve competition in real estate and give consumers the choices they deserve.

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purpose of which is educating the viewers about an upcoming vote on pending legislation, and encouraging them to inform their elected representative to vote for or against the bill (i.e., legislation-centered advertisements)"), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003).

H.R. 3424 will keep the local personalized service consumers now receive from their local neighborhood real estate professionals.

Call Congressman Ferguson at 908-686-5576 to ask him to join more than 160 members of Congress and cosponsor this bipartisan legislation to ensure local choice for our communities.

We need the support of strong leaders such as Congressman Ferguson, so that consumers and local communities will win.

* * *

Call
Congressman Gonzalez
210-472-6195

Tell Him to
Do the Right Thing
and Cosponsor

H.R. 3424 –
"The Community Choice in Real Estate Act"

A COMMITMENT TO
OUR COMMUNITY

Right now, large mega banks are attempting to control more and more of our lives. The Big Bank Congiomerates now want to buy up locally owned and operated real estate companies. The result: consumers lose.

Legislation has been introduced that will preserve our local communities, preserve competition in real estate and give consumers the choices they deserve.

H.R. 3424 will keep the local personalized service consumers now receive from their local neighborhood real estate professionals.

> Call Congressman Gonzalez and ask him to join more than 140 members of Congress and cosponsor this bipartisan legislation to ensure local choice for our communities.
>
> We need the support of strong leaders such as Congressman Gonzalez, so that consumers and local communities will win.[8]

* * *

Like the WRTL communications at issue in this case, NAR's advertisements "describe[d] an issue that . . . was . . . an ongoing issue of legislative concern" in Congress. J.S. App. 23a. Those advertisements explained to the constituents of Congressmen Ferguson and Gonzalez why they should support pending legislation to protect the independence of local real-estate agents, exhorted them to contact those congressmen, and provided a telephone number to call. And, like WRTL's ads, NAR's legislative ads did "not mention an election, a candidacy, or a political party, nor do they comment on a candidate's character, actions, or fitness for office." *Id.*

1. *Grass-roots lobbying is protected by the Speech Clause, the Petition Clause, and the right of association.* Grass-roots lobbying implicates three interrelated protections of the First Amendment, which provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

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[8] These advertisements were published as print advertisements in February 2002, shortly before BCRA's enactment. Because they were not broadcast on radio or television and because they were not run during a pre-election "blackout" period, BCRA would not have prohibited them. *See* 2 U.S.C. § 434(f)(3)(A)(i)(II). Even so, NAR believes that it has the freedom to broadcast during pre-election periods similar advertisements on pending legislative matters that affect its members, and it may wish to exercise that freedom.

First, legislative advocacy is protected speech. As this Court has explained, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). In light of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), this Court has construed the First Amendment to afford "the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people,'" *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)) (alteration in original).[9] Spending on political communications receives the same First Amendment protection because restrictions on that spending "restrain[] . . . the quantity and diversity of political speech." *Buckley*, 424 U.S. at 19; *see id.* at 16-20; *Bellotti*, 435 U.S. at 786 n.23 ("It is too late to suggest 'that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.'") (quoting *Buckley*, 424 U.S. at 16).

This Court's decision in *Bellotti* confirms the conclusion that this case involves protected speech. There, a corporation challenged a state statute forbidding it from

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[9] *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) ("Freedom of expression has particular significance with respect to government because [illegible] that the state has a special incentive to repress opposition [illegible] wields a more effective power of suppression.'") (quoting Thomas Emerson, *Toward a General Theory of the First Amendment* 9 (1966)) (alteration in original); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government."); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) ("Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.").

spending money "for the purpose of influencing the vote on referendum proposals." 435 U.S. at 767. The Court explained that the speech at issue was "at the heart of the First Amendment's protection," *id.* at 776, and "indispensable to decisionmaking in a democracy," *id.* at 777.[10] That was "no less true because the speech [came] from a corporation rather then an individual" because the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.*[11]

Second, this case involves the right "to petition the Government for a redress of grievances." U.S. Const. amend. I. WRTL opposed Senate filibusters of judicial nominees. To redress its grievance, it sought to sponsor advertisements petitioning Senators to end the filibusters and urging others also to petition those Senators. Similarly, NAR opposes the attempts of large banking conglomerates to obtain the authority to participate in local markets for real-estate services. Accordingly, NAR has petitioned (and exhorted others to petition) members of Congress to enact legislation prohibiting such entities from leveraging the substantial economic advantages they

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[10] *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("issue-based" advocacy "is the essence of First Amendment expression" and "[n]o form of speech is entitled to greater constitutional protection").

[11] *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990) ("The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment."); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8 (1986) (plurality) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.") (internal quotation marks omitted); *Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n*, 447 U.S. 530, 533 (1980) ("The restriction on bill inserts cannot be upheld on the ground that [the corporation] is not entitled to freedom of speech."); *Bellotti*, 435 U.S. at 778 n.14 (listing 11 cases invalidating laws infringing speech by corporate bodies).

enjoy as federally chartered institutions to engage in real-estate brokerage, to the detriment of local independent real-estate agents who do not enjoy those advantages. This Court has indicated that such "publicity campaign[s] to influence governmental action fall[] clearly into the category of political activity" protected by the Petition Clause. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140-41 (1961); *see id.* at 137-38.

Third, this case involves the ability of corporations "effectively [to] amplify[] the voice[s] of their adherents" – which the First Amendment freedom of association protects. *Buckley*, 424 U.S. at 22 (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)); *see Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294 (1981) (the value of associative communication "is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost"); *see also Buckley*, 424 U.S. at 15 ("The First Amendment protects political association as well as political expression."); *NAACP v. Button*, 371 U.S. 415, 428 (1963) (corporation may raise right of association "on its own behalf").

2. *Section 203 burdens the rights to speak, petition, and associate.* As applied to the type of grass-roots lobbying at issue here, BCRA § 203's regulation on electioneering communications burdens all three of those important First Amendment freedoms. Section 203 precluded WRTL from sponsoring its three planned advertisements. *See* J.S. App. 6a-7a & nn.7-8. Likewise, BCRA prohibits NAR from broadcasting advertisements like those reproduced above on either radio or television (the most effective media[12]), in the congressmen's districts, for three out of every 24 months (election time, when the congressmen are most attuned to the telephone calls that the ad urges constitu-

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[12] *See Buckley*, 424 U.S. at 19 (broadcast media are "indispensable instruments of effective political speech").

ents to make[13]) – simply because the ads contain names of candidates for federal office.[14] Under an FEC rule, such ads would be prohibited even if they asked viewers only to call "your Congressman." 11 C.F.R. § 100.29(b)(2); *see* 2 U.S.C. § 431(18). Grass-roots lobbying of the type engaged in by WRTL and NAR is impossible, of course, if a legislative advertisement cannot recommend even that a viewer contact "your Congressman."[15]

Prohibiting corporations from using their general treasuries for advocacy of a legislative agenda imposes a content-based burden on freedom of speech. *See Austin*, 494 U.S. at 657-58; *id.* at 669 (Brennan, J., concurring).[16] Similarly, because the statute restricts WRTL's ability to conduct "a publicity campaign to influence governmental action," *Noerr Motor Freight*, 365 U.S. at 140-41, and "effectively [to] amplify[] the voice of [its] adherents," *Buckley*, 424 U.S. at 22, it trenches on the guarantees of the Petition Clause and the right of association.

3. *No compelling government interest justifies § 203's burden on legislative advocacy.* Because BCRA § 203

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[13] *See McConnell*, 251 F. Supp. 2d at 793-94 (Leon, J.) (discussing record evidence that "the periods immediately preceding elections are the most effective times to run issue advertisements discussing pending legislation because the public's interest in policy is at its peak").

[14] *See McConnell*, 540 U.S. at 334-35 (Kennedy, J., concurring in the judgment in part and dissenting in part) (explaining some of the reasons why grass-roots advocacy must mention the names of members of Congress to be effective).

[15] *See McConnell*, 251 F. Supp. 2d at 794 (Leon, J.) (citing record evidence making this point).

[16] *See also MCFL*, 479 U.S. at 263 ("While the burden on MCFL's speech is not insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification."); *id.* at 255 (plurality) ("[T]hat the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities."); *id.* at 265-66 (O'Connor, J., concurring in part and concurring in the judgment); *cf. McIntyre*, 514 U.S. at 345 (statute requiring campaign literature to identify the author is "a direct regulation of the content of speech").

burdens fundamental First Amendment freedoms, the district court rightly employed "exacting scrutiny" in testing § 203's application to WRTL's ads. *Buckley*, 424 U.S. at 16, 44-45; *see McConnell*, 540 U.S. at 205; *Austin*, 494 U.S. at 669 (Brennan, J., concurring) (such restrictions "must be analyzed with great solicitude and care"); J.S. App. 25a. Statutory burdens on First Amendment rights "must be justified by a compelling state interest," *MCFL*, 479 U.S. at 256, and "narrowly tailored to serve" that interest, *McIntyre*, 514 U.S. at 347. This Court has identified a compelling government interest in restricting corporate expenditures on electoral campaigns to prevent "corruption or the appearance of corruption." *Austin*, 494 U.S. at 658; *see McConnell*, 540 U.S. at 205, 206 n.88; *FEC v. Beaumont*, 539 U.S. 146, 154 (2003); *FEC v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982); *Bellotti*, 435 U.S. at 788-89.[17]

But this Court's cases also have recognized that the "unusually important interests underl[ying] the regulation of corporations' *campaign-related* speech" do not apply to legislative advocacy. *McConnell*, 540 U.S. at 206 n.88 (emphasis added). *Bellotti* unequivocally establishes the point. There, the Court held that "[t]he risk of corruption perceived in cases involving candidate elections *simply is not present in a popular vote on a public issue.*" 435 U.S. at 790 (citations omitted; emphasis added).[18] The

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[17] In the electoral context, the Court also has recognized a government interest in restricting corporate and union giving and spending on political campaigns to "protect[] the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *Beaumont*, 539 U.S. at 154 (internal quotation marks omitted). That interest does not apply to organizations, such as WRTL and NAR, whose mission involves advocating legislative changes that would benefit the organization and its members. *See MCFL*, 479 U.S. at 260-61.

[18] *See Austin*, 494 U.S. at 677 (Brennan, J., concurring) (recognizing that, while the government can regulate corporate speech on candidate elections, "a State cannot prohibit corporations from making many other types of political expenditures"); *id.* at 678 (Stevens, J., concur-

speech at issue there – corporate-sponsored advertisements meant to influence a vote on a referendum proposal – cannot meaningfully be distinguished from the legislative advocacy at issue here.

In upholding § 203 against a facial challenge in *McConnell*, this Court identified no compelling government interest justifying the application of BCRA § 203 to true legislative advocacy – advertisements that are not "the functional equivalent of express advocacy." 540 U.S. at 206. Indeed, the Congress that considered BCRA,[19] and the President who signed it,[20] showed by their statements that they perceived no compelling government interest in regulating true legislative advertisements. Congress empowered the FEC to exempt genuine issue ads, *see* 2

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ring) ("[T]here is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other."); *see also National Right to Work Comm.*, 459 U.S. at 210 n.7 (interpreting *Bellotti* as recognizing that, "in elections of candidates to public office, *unlike in referenda on issues of general public interest*, there may well be a threat of real or apparent corruption") (emphasis added); *Consolidated Edison*, 447 U.S. at 535 (invalidating a regulation that "limited the means by which [a corporation could] participate in the public debate on . . . controversial issues of national interest and importance").

[19] *See* 147 Cong. Rec. S2845-46 (daily ed. Mar. 26, 2001) (statement of Sen. Wellstone) (repeatedly referencing "sham issue ads" and stating that "I am not talking about ads . . . that are legitimately trying to influence policy debates . . . I am not talking about legitimate policy ads"); *id.* at S2812-13 (daily ed. Mar. 23, 2001) (statement of Sen. Jeffords) (BCRA's prohibition on electioneering communications not intended to "affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes" or "to urge their members and the public through grassroots communications to contact their lawmakers on upcoming issues or votes"; "[a]ny organization can, and should be able to, use their grassroots communications to urge citizens to contact their lawmakers").

[20] *See* Statement by President George W. Bush Upon Signing H.R. 2356, 38 Weekly Comp. Pres. Doc. 517 (Mar. 27, 2002) ("I also have reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election."), *reprinted in* 2002 U.S.C.C.A.N. 125.

U.S.C. § 434(f)(3)(B)(iv), but the FEC has refused to so,[21] even though several of the intervenors in this case recommended an exemption that would have shielded some legislative advocacy from regulation.[22] Because no compelling state interest justifies the application of BCRA to WRTL's advertisements, the district court correctly held that the statute is unconstitutional as applied to them. *See MCFL*, 479 U.S. at 263; *Bellotti*, 435 U.S. at 795.

B. NAR's Advertisements Are Not The Functional Equivalent Of Express Advocacy

Neither the FEC nor the intervenors contend that BCRA § 203's application to WRTL's advertisements is not subject to strict scrutiny. Rather, they argue that Congress's interest in regulating electoral advocacy justifies prohibiting WRTL's planned advertisements. Regardless of how the Court rules on WRLT's advertisements, NAR's advertisements reproduced above present tangible examples of genuine legislative communications under any reasonable test.

Notably, with one insignificant exception, NAR's communications meet the stringent test articulated by several of the intervenors in their comments to the FEC on its proposed exemption for grass-roots lobbying. Those intervenors have suggested that a communication would be

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[21] *See Electioneering Communications*, 67 Fed. Reg. 65,190, 65,201-02 (Oct. 23, 2002) (rejecting proposed exemptions for true legislative communications because, "[a]lthough some communications that are devoted exclusively to pending public policy issues before Congress or the Executive Branch may not be intended to influence a Federal election, the Commission believes that such communications could be reasonably perceived to promote, support, attack, or oppose a candidate in some manner").

[22] *See* Letter from Senator John McCain *et al.* to Mai Dinh, FEC, at 10-11 (Aug. 23, 2002) ("McCain Letter") (proposing an exemption "allow[ing] individuals and entities concerned about legislation to run true issue ads with a legislative objective and a request to contact an elected official during the 30 or 60 day windows"), *available at* http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf.

"plainly and unquestionably . . . wholly unrelated to an election" if it satisfied the following criteria: (i) the ad concerns only a legislative or executive branch matter; (ii) the ad's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; (iii) the ad refers to the candidate only by the use of a phrase like "your congressman" or "your senator" and does not include the name or likeness of the candidate; (iv) the ad does not reference a political party; (v) the ad does not reference the candidate's record or position on any issue, the candidate's qualifications or fitness for office, or the candidate's election or candidacy. McCain Letter at 10 (internal quotation marks omitted).

Applying the McCain test, NAR's communications concerned only a legislative matter – a pending bill to prevent national banking conglomerates from entering and dominating the real-estate business, to the exclusion of small, independent real-estate brokers. The only references to the two congressmen were statements asking them to support that bill and urging viewers to contact them and tell them to support the bill. The advertisements did not reference a political party, the congressmen's records or positions on any issue, the congressmen's qualifications or fitness for office, or their election or candidacy. But for the fact that NAR's ads mention the congressmen by name, they would meet every criterion of the McCain test. But that fact alone cannot transform the communications into the functional equivalent of express advocacy. To be sure, whether the ad uses the candidate's name may be relevant to whether it has an electoral nature, but basic common sense dictates that use of a name in an advertisement cannot be dispositive.

C. Legislative Advocates Do Not Bear The Burden Of Establishing A Legal Test

The FEC also asserts that WRTL cannot succeed on its as-applied challenge unless it articulates a legal test that

identifies advertisements that are different in kind from electoral advocacy and that is neither unduly complex nor susceptible of evasion. FEC Br. 27. The FEC further asserts that the class of issue advertisements to which BCRA § 203 cannot constitutionally be applied should be defined without reference to the text or content of the advertisements. *Id.* at 43. Intervenors, for their part, apparently recognize no circumstances under which BCRA § 203 cannot constitutionally be applied to legislative advocacy. *See* Appellants Br. 40 n.27 (acknowledging possible exceptions only for commercial advertisements that incidentally mention the name of a candidate).

NAR submits that the FEC's legal-test requirement has no basis in this Court's cases and should be rejected. Entities like WRTL (and possibly, in the future, NAR) should not be required to establish an iron-clad legal test to govern future cases as a condition for obtaining relief from an unconstitutional statute. If no compelling government interest supports the application of BCRA § 203 to particular speech, then the statute is unconstitutional as applied to that speech.

Contrary to the FEC's contention, this Court's decision in *MCFL* does not support the FEC's legal-test requirement. There, the Court held that the prohibition on corporate expenditures on express candidate advocacy was unconstitutional as applied to a nonprofit advocacy corporation (MCFL) that did not accept donations from business enterprises. *See MCFL*, 479 U.S. at 263-64. This Court concluded that corporations like MCFL could engage in electoral advocacy without creating the problems at which the prohibition on corporate electoral advocacy was targeted. While (presumably to provide guidance for future cases) the Court detailed the three features of MCFL that it found dispositive, it did not impose on MCFL the burden of establishing an airtight and administrable legal test to prevail on its as-applied challenge. *See id.* Indeed, this Court rejected the contention that "the desire for a bright-line rule," which would be easily

administrable, "justif[ied] any infringement on First Amendment freedom." *Id.* at 263.

Furthermore, *MCFL* is different from this case because MCFL there sought an exemption to engage in *express candidate advocacy*. In that context, it made sense for the Court to articulate how MCFL differed in "kind" from the ordinary business corporation, which Congress had a compelling interest in barring from spending on electoral campaigns. *Id.* Here, by contrast, the compelling government interest in restricting corporate electoral spending does not apply to WRTL's planned communications because NAR (and, indeed, the district court) does not view WRTL as attempting to engage in electoral advocacy. Here, too, there is a difference in "kind," but the difference is that genuine legislative advocacy is different in its essential message from electoral advocacy. Contrary to the FEC's contention, however, whether a particular communication is electoral advocacy can be determined only by examining the text of the communication at issue.

Finally, the *MCFL* Court recognized that as-applied challenges can succeed even when "the class of organizations affected by [the Court's] holding [may] be small." *Id.* at 264. Similarly, the FEC cannot diminish the significance of the First Amendment rights at stake in this case by asserting that the class of true legislative ads captured by the definition of electioneering communication is small. As the Court in *MCFL* concluded:

> Freedom of speech plays a fundamental role in a democracy .... Our pursuit of other governmental ends, however, may tempt us to accept in small increments a loss that would be unthinkable if inflicted all at once. For this reason, we must be as vigilant against the modest diminution of speech as we are against its sweeping restriction.

Id. at 264-65.

D. The Court Should Limit Any Examination Of Context

Under the circumstances, even if the McCain test were to state properly the law, one would expect that NAR should feel somewhat confident that it could prevail in an as-applied challenge, considering that its advertisements concern only a pending legislative matter and contain nothing suggesting an electoral intent or effect. But in reality NAR and others like it can take little comfort because the FEC and the intervenors here assert that the FEC can mine the ads' "context" to discover some purported indicia of electioneering intent or effect. As the district court explained, that approach disserves First Amendment values and is impractical. *See* J.S. App. 19a-22a.

Furthermore, a search for contextual evidence of electioneering intent or effect ignores the approach that this Court took in *McConnell*. There, the Court found it unnecessary to look to context in giving examples of sham issue ads that were the functional equivalent of express advocacy. *See* 540 U.S. at 126-27, 193 n.78. And a focus on the text of the advertisement itself comports with the test put forth by several intervenors in their submission to the FEC. *See* McCain Letter at 10.

Particularly pernicious is the FEC's and the intervenors' focus on statements that WRTL (or its PAC) made in other contexts. *See* FEC Br. 47-48; Appellants Br. 23-24. Indeed, the intervenors would go even further, considering communications made by individuals and groups *other than* WRTL or its PAC. *See* Appellants Br. 25-27. The consequence of that focus is to strip an entity that has made negative statements about an incumbent in the past (or that is considered to be associated with those who have) of its First Amendment right to engage in pre-election grass-roots lobbying of that incumbent on any legislative issue. While it is easy to understand why an incumbent legislator interested in preserving power would

favor such a rule, that does not make it comport with the First Amendment.

E. Print Media May Not Be An Available Alternative

Both the FEC and the intervenors assert that BCRA § 203 does not impose a particularly severe burden on First Amendment activities in part because affected parties like NAR have the option of communicating through non-broadcast media. *See* FEC Br. 36; Appellants Br. 31 n.20. But they fail to mention that the FEC recently has employed an expansive interpretation of the prohibition on expenditures for express advocacy – a prohibition that applies to all media. Specifically, the FEC has promulgated a broad regulatory definition of express advocacy, and it has signaled a willingness to apply that definition, using a wide-ranging contextual analysis, to prohibit communications that neither contain actual express advocacy nor meet the definition of electioneering communication.

Last year, the FEC found probable cause to believe that the Sierra Club had violated 2 U.S.C. § 441b(a), which (as interpreted by this Court in *MCFL*, 479 U.S. at 249) prohibits corporations from making independent expenditures for express candidate advocacy.[23] It based that conclusion in part on the following definition of express advocacy contained in an FEC regulation:

> When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because –
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

---

[23] *See* Letter from Lawrence H. Norton, General Counsel, FEC, to B. Holly Schadler, Esq., and Michael B. Trister, Esq. (July 21, 2006), *available at* http://eqs.nictusa.com/eqsdocs/00005810.pdf.

> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b).

In contending that the communication at issue there, a voter guide, constituted express advocacy under that regulation, the FEC General Counsel's Office gleaned that the "electoral portion" was "suggestive" based on an examination of some of the same "contextual" facts that it relies on here – namely, that the guide was issued in the pre-election period; that it mentioned clearly identified candidates for federal office; and "the Sierra Club's well-known stance promoting environmental regulation." First General Counsel's Report at 11 (Aug. 10, 2005) ("FEC Report"), *available at* http://eqs.sdrdc.com/eqsdocs/00005805.pdf. Thus, the FEC showed a willingness to preclude pre-election speech containing candidates' names even when that speech does not fall within the definition of electioneering communication.

Even worse, the Office cited *McConnell* as support for its expansive interpretation of the express-advocacy requirement. *See id.* at 16. The Office observed that *McConnell* had held that the express-advocacy standard was not a constitutional requirement and had sustained the "promote, support, attack, or oppose" standard against a vagueness challenge. *See id.* at 14-16. But this Court imposed the express-advocacy requirement because the statute as written was unduly vague. *See MCFL*, 479 U.S. at 249; *Buckley*, 424 U.S. at 42-44, 76-80. Nothing in *McConnell*'s holding that the express-advocacy standard does not articulate a constitutional line authorized the FEC to substitute a vague regulatory definition for this Court's narrowing construction of a vague statute. Moreover, the FEC's regulatory standard is a far cry from the relatively straightforward "promote, support, attack, or oppose" test sustained by this Court. The regulation applies when, considering whatever contextual factors the

FEC deems relevant, "*[t]he electoral portion of the communication*" (whatever that portion might be) "is unmistakable, unambiguous, and *suggestive* of only one meaning; and . . . [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages *some other kind of action*" (whatever that action might be). 11 C.F.R. § 100.22(b) (emphases added).

The FEC General Counsel's Office also noted that *McConnell* had upheld the definition of electioneering communication against an overbreadth challenge and had "acknowledged that the definition of electioneering communication would cover some ads which have no electioneering purpose." FEC Report at 16. The Office thus signaled it believed itself to be empowered to regulate speech that is not express advocacy, and that may not even have an "electioneering purpose."

The Sierra Club case, which was the FEC's first use of § 100.22(b) since *McConnell*,[24] leaves speakers with little reason to credit the FEC's and the intervenors' assertions that, regardless of the outcome of this case, they will continue to be able to conduct legislative advocacy in the preelection period through print media. Indeed, to the extent the FEC is able to apply § 100.22(b) in this sweepingly broad fashion to corporate-sponsored ads that are not "electioneering communications" under BCRA § 203, there is little reason to think that the FEC will not similarly do so with respect to ads like those of WRTL at issue here, and thereby functionally eviscerate the constitutional protection to which true legislative advocacy is entitled.[25]

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[24] *See* Third General Counsel's Report at 3 (Nov. 3, 2006), *available at* http://eqs.sdrdc.com/eqsdocs/00005811.pdf. The case was settled after the FEC's finding of probable cause. *See* Letter from Susan L. Lebeaux, Assistant General Counsel, FEC, to B. Holly Schadler, Esq., and Michael B. Trister, Esq. (Nov. 15, 2006), *available at* http://eqs.nictusa.com/eqsdocs/00005815.pdf.

[25] The particular communication at issue in the Sierra Club case may have been fairly characterized as express advocacy based on an

CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted,

LAURENE K. JANIK
RALPH W. HOLMEN
NATIONAL ASSOCIATION OF REALTORS®
430 North Michigan Ave.
Chicago, IL 60611-4087
(312) 329-8375

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for National Association of REALTORS®

March 23, 2007

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examination of the ad's text only. *See* FEC Report at 9-10. Nevertheless, the FEC's suggestion that *McConnell* authorizes it to use a vague regulatory standard to prohibit communications that may "have no electioneering purpose," *id.* at 16, is troubling and likely to chill constitutionally protected speech.

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FEDERAL ELECTION COMMISSION,

Appellant,

v.

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WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

and

SENATOR JOHN McCAIN, REPRESENTATIVE TAMMY BALDWIN, REPRESENTATIVE CHRISTOPHER SHAYS, and REPRESENTATIVE MARTIN MEEHAN,

Appellant-Intervenors,

v.

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICUS CURIAE* NATIONAL RIFLE ASSOCIATION IN SUPPORT OF APPELLEE

CHARLES J. COOPER
Counsel of Record
BRIAN S. KOUKOUTCHOS
DAVID H. THOMPSON
COOPER & KIRK, PLLC
555 Eleventh Street, NW
Suite 750
Washington, D.C. 20004
(202) 220-9600

March 23, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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INTEREST OF *AMICUS*[1]

Amicus National Rifle Association ("NRA") is a nonprofit voluntary membership corporation that qualifies as tax-exempt under 26 U.S.C. § 501(c)(4). Its approximately four million members are individual Americans who have come together for the common purpose of ensuring the preservation of rights under the Second Amendment. The NRA was a principal challenger of Title II of BCRA when that statute was last before this court. *See NRA v. FEC*, No. 02-1675, *decided with McConnell v. FEC*, 540 U.S. 93 (2003). The NRA was specifically targeted, by name, by sponsors of the Wellstone Amendment, BCRA § 204 (adding 2 U.S.C. § 441b(c)(6)), which was enacted for the purpose of extending Title II to nonprofit issue advocacy organizations. *See* 147 CONG. REC. S2847 (Mar. 26, 2001) (statement of Sen. Wellstone). The NRA was also the single largest victim of Title II's restrictions on electioneering speech, insofar as the NRA accounted for fully one third of the issue ads that were criminalized by BCRA. Since that decision four years ago, the political voices of the NRA's millions of members have been stifled by Title II, and *amicus* therefore respectfully urges this Court to overrule *McConnell*.

SUMMARY OF ARGUMENT

The decision in *McConnell v. FEC* should be reconsidered. The decision has not had time to become imbedded in our legal culture; indeed, the scope and meaning of

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

McConnell remain in flux due to this Court's unanimous recent decision permitting challenges to the statute as applied. *Stare decisis* is at its weakest when, as the decision below reveals, the governing decision has created an unworkable regime. In the face of the First Amendment's ancient and pervasive protection of political speech, the recently minted precedent of *McConnell* cannot stand.

As both a content-based restriction and a limit on independent political expenditures, Title II is subject to strict scrutiny – a level of review that it cannot survive because it was enacted by Congress with the openly avowed, and illegitimate, purpose of suppressing criticism of incumbent elected officials in the form of negative issue ads. Title II's restraint on "electioneering communications" is the modern equivalent of the 18th-century Sedition Act – an infamous criminal statute aimed at suppressing criticism of the government. Under the unanimous analysis of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), such a law cannot stand.

Title II must also be struck down because it is fatally overbroad. All the parties and the Members of this Court concur that there is no practical difference between issue advocacy and advocacy of the election or defeat of a political candidate. But Title II's defenders and the *McConnell* majority draw the wrong conclusion from this reality, reasoning that, if one cannot distinguish between protected speech and unprotected electioneering communications, then the State may outlaw all of it, and leave any speaker who seeks an exception for "real" issue ads either to bring an as-applied challenge or to speak and risk felony prosecution. The Constitution, we respectfully submit, requires the Court to put its thumb on the other

side of the scale, in favor of protecting speech, rather than suppressing it.

Nor can Title II be justified by the supposed need to prevent "corruption." Gratitude and responsiveness for political support are not signs of corruption – they are the hallmarks of democracy. This Court's precedents draw a line between advocacy organizations that fund their speech with individual dues and trade associations that fund their speech largely with contributions from business corporations. The former pose no danger of corrupting the political marketplace through wealth generated in the economic marketplace.

Title II's congressional supporters understood that requiring grassroots advocacy organizations to speak through political action committees would reduce the collective voice of their millions of members to a whisper, and experience since *McConnell* has borne that out. Such suppression of speech is impermissible under strict scrutiny if there is a less restrictive means of achieving the State's compelling purpose. Congress has already enacted such a less restrictive alternative, in the form of Section 203(b), the original Snowe-Jeffords provision, which was nullified by the Wellstone Amendment (Section 204 of BCRA). That provision would ensure that the political voices of advocacy groups are not unfairly amplified by corporate wealth generated in the economic marketplace, by permitting electioneering communications by advocacy groups like the NRA, so long as they are paid for exclusively with contributions from individual donors. In contrast, the Wellstone Amendment, by preventing such organizations from engaging in any "electioneering communications" for fear that a single corporate dollar might otherwise lend indirect assistance, suppresses far more

speech than necessary. With the less restrictive alternative of the Snowe-Jeffords provision at hand, Section 204 cannot survive strict scrutiny.

ARGUMENT

I. *STARE DECISIS* DOES NOT REQUIRE ADHERENCE TO *McCONNELL*.

When the Court misapplied the First Amendment in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), it promptly recognized its error and overruled the case just three years later. *See West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Similarly prompt correction is warranted now with respect to *McConnell v. FEC*, 540 U.S. 93 (2003). *Stare decisis* is not an "inexorable command," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting), nor is it "rigidly required in constitutional cases," *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Unlike cases where the Court appropriately adheres to an existing precedent despite its flaws, here there is no reason to shy away from righting a manifest constitutional error.

The *McConnell* decision is only four years old and therefore certainly has not become imbedded in our "national culture." *Cf. Dickerson v. United States*, 530 U.S. 428, 443-44 (2000) (declining to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), which *had* become imbedded); *Randall v. Sorrell*, 126 S. Ct. 2479, 2490 (2006) (Breyer, J., joined by Roberts, C.J.) (declining to overrule *Buckley v. Valeo*, 424 U.S. 1 (1976), because it has "promoted considerable reliance"). Indeed, the scope and meaning of *McConnell* are and will likely remain in flux, given this Court's unanimous decision in *Wisconsin Right*

to Life, Inc. v. FEC, 126 S. Ct. 1016, 1018 (2006) (*per curiam*), permitting challenges to the statute as applied. *Stare decisis* is particularly weak when experience has shown that "governing decisions" have created a legal regime that is "unworkable." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545-46 (1985). This case involves no "property" or "contract rights where reliance interests" are at stake. *Payne*, 501 U.S. at 828. Therefore, overruling *McConnell* would disturb no reliance interests, but would instead bring coherence to this Court's First Amendment jurisprudence.

Precedent is more vulnerable where it "conflicts with a public sense of justice." *Id.* at 834 (Scalia, J., concurring, joined by O'Connor and Kennedy, JJ.). That is particularly true when what is at stake is freedom of speech, the one "fixed star in our constitutional constellation." *Barnette*, 319 U.S. at 642. Reflexive reverence for precedent is least appropriate in cases involving the *political* speech that lies at the very core of the First Amendment. *McConnell* should be overruled because it stands as "a positive detriment to coherence and consistency" in the law of the First Amendment. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

II. TITLE II OF BCRA CANNOT SURVIVE STRICT SCRUTINY BECAUSE IT WAS AVOWEDLY ENACTED TO SUPPRESS CRITICISM OF INCUMBENT GOVERNMENT OFFICEHOLDERS.

A. It is common ground that, as both a content-based restriction and a limit on independent political expenditures (rather than contributions), Title II is subject to strict scrutiny. *See Riley v. National Fed'n of the Blind*, 487

U.S. 781, 795 (1988); *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440-41 (2001); *McConnell*, 540 U.S. at 205. To sustain a content-based restriction on political speech, the Government must establish that *the purpose that actually animated enactment* of the measure is compelling and is narrowly served by the restriction. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 191 (1997). Therefore, neither the Defendants nor this Court may go beyond Title II's text and legislative history to discern and evaluate "the disease sought to be cured" by its limits on electioneering communications. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (quotation marks and citation omitted). This is the first place where the Court erred in *McConnell,* because it ignored the undisputed record that laid bare Congress's avowed – and utterly illegitimate – purpose.

B. The majority opinion in *McConnell* treated Section 203 of BCRA as if it were "legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" 540 U.S. at 205 (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990)). The majority simply assumed, *without a single reference to the legislative history*, that this was Congress's purpose in Section 203. *See* 540 U.S. at 203-09. That was manifest error.

The legislative record made clear that Congress enacted Section 203 to stifle negative campaign ads based on their content. "Frequently an issue of this sort will

come before the Court clad, so to speak, in sheep's clothing" – sometimes a design to suppress speech "is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). Senator McCain, BCRA's principal sponsor and the leading Incumbent Intervenor defending the statute here, put BCRA's goal in terms so plain that the majority in *McConnell* could evade Congress's intent only by resolutely refusing to examine the legislative record:

> I hope that we will not allow our attention to be distracted from the real issues at hand – how to raise the tenor of the debate in our elections. . . . No one benefits from negative ads. They don't aid our Nation's political dialog.

540 U.S. at 260 (Scalia, J., dissenting) (quoting remarks of Sen. McCain).[2] Senator Wellstone, who drafted the amendment that became BCRA Section 204, declared that " 'these issue advocacy ads are a nightmare. I think all of us should hate them. . . . [By passing the legislation] [w]e could get some of this poison politics off television.' " *Id.* at 260 (quoting remarks of Sen. Wellstone). Senators and Congressmen repeatedly lined up to stress that " '[t]his bill is about slowing the ad war. . . . It is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate

[2] As in *McConnell* itself, the leading sponsors of BCRA (Sen. McCain, *et al.*) have intervened in this dispute as defendants in order to defend the incumbency-protecting statute that they authored and enacted. We refer to them and their brief herein as the Incumbent-Intervenors.

the airwaves.'" *Id.* (quoting remarks of Sen. Cantwell).[3] Title II's supporters opined that negative attack ads were unworthy of First Amendment protection because they were not speech, but more akin to "crack cocaine," "drive-by shooting[s]" and "air pollution." *Id.* (citations and quotation marks omitted).[4]

> The real world is that the overwhelming majority of ads that we see running today are attack ads that are called issue ads, which are direct, blatant attacks on the candidates. . . . We don't think that's right.[5]

Section 203's content-based restriction on political speech is particularly suspect because it was enacted by incumbent legislators to help them keep their jobs: it "*targets* for prohibition certain categories of campaign speech that are particularly harmful to incumbents." *McConnell*, 540 U.S. at 249 (Scalia, J., dissenting) (original emphasis). *See also id.* at 262-63. But "insulat[ing] legislators from effective electoral challenge" is not even a legitimate, let alone a compelling, governmental purpose. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 403-04 (2000) (Breyer, J., concurring). *See also Randall*, 126 S. Ct. at 2492, 2496, 2499 (Breyer, J., joined by Roberts, C.J., and Alito, J.); *McConnell*, 540 U.S. at 323 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., dissenting) ("That the Government would regulate [negative

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[3] The NRA submitted an exhaustive review of BCRA's extensive legislative history in *McConnell* in the form of two documents: as part of the Joint Appendix in *McConnell v. FEC*, No. 02-1674 ("JA") and an Appendix of Legislative History appended to NRA's briefs in *NRA v. FEC*, No. 02-1675 ("LH App."). Both are available in the Court's files.

[4] *See also, e.g.*, NRA Appendix in *NRA v. FEC*, No. 02-0581 (D.D.C.) ("NRA App.") 54-60; LH App. 1a-45a, 49a, 56a.

[5] *See* JA 936 (Sen. McCain Dep.) at p. 100.

issue ads] for this reason goes only to prove the illegitimacy of the Government's purpose.").

The record on this point is overwhelming and *undisputed.* In *McConnell*, the Government did not even try to contest that the legislative record manifests the impermissible purpose behind Title II. And the Incumbent Intervenors, far from denying that the statute's goal was to stifle the negative attack ads that they so disliked, unabashedly emphasized this purpose during their depositions in the *McConnell* litigation.[6]

C. Title II's restraint on "electioneering communications" is another example of the predictable and deplorable "standard practice" of the governors "us[ing] the criminal law to insulate themselves from disagreement" by the governed. ANTHONY LEWIS, MAKE NO LAW 52 (1991). Like Title II, the Sedition Act of 1798 was specifically aimed at stifling speech critical of the federal government and its elected members. Proponents of the Sedition Act in the 5th Congress, like BCRA's supporters in the 107th, decried "malicious calumnies against Government," speech designed to "inflame . . . constituents against the Government," publications "calculated to destroy . . . every ligament that unites . . . man to society and to Government," and "representations [that] are outrages on the national authority, which ought not to be suffered." NRA App. 111-13. Congressional opponents of the Sedition Act, like opponents of BCRA, argued then, as we do now:

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[6] *See, e.g.*, JA 939-40 (Sen. McCain Dep.) at p. 127; JA 914-15 (Sen. Jeffords Dep.) at p. 76; JA 906 (Sen. Jeffords Dep.) at p. 15; JA 910 (Sen. Jeffords Dep.) at p. 22; JA 972 (Rep. Meehan Dep.) at p. 54; JA 749 (Rep. Shays Decl.) ¶13.

> This bill and its supporters suppose, in fact, that whoever dislikes the measures . . . of a temporary majority in Congress, and shall . . . express his disapprobation and his want of confidence in the men now in power, is seditious and is liable to punishment. . . . If you thus deprive the people of the means of obtaining information of their conduct, you in fact render their right of electing nugatory; and this bill must be considered only as a weapon used by a party now in power, in order to perpetuate their authority and preserve their present places.[7]

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964), this Court unanimously observed that the Sedition Act, "because of the restraint it imposed upon criticism of government and public officials," had been universally condemned "in the court of history" as a blatant infringement on freedom of speech. If this judgment on the Sedition Act is correct, then Title II's modern version of it must fall.

D. Nor can Title II's limitation on electoral speech be reconciled with this Court's decision in *New York Times v. Sullivan*, which concerned a political advertisement run in THE NEW YORK TIMES by an "interest group" – the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." The ad was found to refer to an elected official and to falsely criticize his handling of civil rights protests in Alabama. The issue was whether the First Amendment "limit[s] a State's power to award damages in a libel action brought by a public official against critics of his official conduct." *Id.* at 256. Emphasizing that "[i]t is as much [the citizen's] duty to criticize

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[7] NRA App. 114.

as it is the official's duty to administer," *id.* at 282, the Court held that the First Amendment prohibits such an action unless the public official can show that the defamatory statement was made with actual malice. The *Sullivan* Court's reasoning is equally dispositive of Title II.

At the heart of the Court's unanimous ruling was its recognition that political speech is the lifeblood of democracy and that "debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. That the political speech was contained in a paid advertisement was irrelevant; the First Amendment protects "persons who do not themselves have access to publishing facilities" no less than it protects the press. *Id.* at 266. Nor did the advertisement's false and defamatory nature suffice to deprive it of First Amendment protection, for "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). And the *Sullivan* Court emphasized, over and over again, that speech concerning the conduct of public officials and candidates for public office is essential to the vitality of democracy itself. Quoting James Madison, the Court said this: "The value and efficacy of this right [to vote] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." *Id.* at 275 (citation omitted). Accordingly, until *McConnell* this Court had consistently held "that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 50 (1976).

In the record before the Court in *McConnell* were thousands of the "negative attack ads" that Title II suppresses. To dispose of this case, it is enough to note simply that *every single one of them* would be protected by the First Amendment from a libel action brought by the attacked candidate. But Title II cuts even deeper into the heart of the First Amendment than did the defamation action invalidated in *Sullivan*. Title II goes beyond rendering speech actionable in tort; it *criminalizes* speech outright and punishes the speaker with imprisonment. Title II goes beyond just reaching and restraining false speech; it reaches and criminalizes *the truth*. Title II goes beyond just restraining political speech, it targets *electoral* speech about candidates for public office during the weeks before citizens go to the polls.

Title II's restrictions on electioneering communications thus violate the most fundamental postulates of free speech. In the face of the First Amendment's ancient, broad, deep and pervasive protection of political speech, the recently minted precedent of *McConnell* cannot stand. Adherence to a previous ruling is unwarranted when it "involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Adarand Constructors v. Pena*, 515 U.S. 200, 231 (1995) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

III. TITLE II IS FATALLY OVERBROAD AND STRICT SCRUTINY THEREFORE MANDATES THAT IT BE STRUCK DOWN.

Until *McConnell*, *Austin v. Michigan Chamber of Commerce* was "the only time [the] Court had allowed the Government to exercise the power to censor political

speech based on the speaker's corporate identity." *McConnell*, 540 U.S. at 326 (Kennedy, J., dissenting). But

> *Austin* was based on a faulty assumption. Contrary to Justice Stevens' proposal that there is a "vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other," there is a general recognition now that discussions of candidates and issues are quite often intertwined in practical terms.

Id. at 327 (Kennedy, J., dissenting). Indeed, there is total unanimity on this point among both the parties and this Court. As the majority expressed it in *McConnell*, "'[i]t is foolish to believe there is any practical difference between issue advocacy and advocacy of a political candidate. What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day.'" 540 U.S. at 126 n.16 (quoting a former official of the NRA's Political Action Committee). Both the Government (SG Br. at 30) and the Incumbent Intervenors (Incumbents Br. at 35) take precisely the same position and support it by quoting precisely the same NRA official. This insight is hardly new. *See Buckley*, 424 U.S. at 42 ("the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application").

Although there is, thus, agreement as a factual matter on the enormous breadth of Title II's criminalization of political speech, Title II's defenders and the *McConnell* majority draw the wrong conclusion from this. They reason that, if one cannot distinguish between constitutionally protected speech and electioneering communications that the government may restrict, then the *State may outlaw all of it*, and leave any speaker who thinks he

deserves an exception for "real" issue ads to bring an as-applied challenge or to speak and risk felony prosecution. This brings to mind the question put to Simon de Montfort's papal advisor during the Albigensian Crusade, when the crusading knights asked their leader how, once they stormed the town, they were to distinguish good, orthodox Christians from the Cathar heretics that were to be put to death. The papal legate replied: kill them all and let God sort them out.

This same harsh rule flows from this Court's decision in *McConnell*, and it gets the First Amendment precisely backwards. The Constitution, we respectfully submit, requires the Court to put its thumb on the *other* side of the scale, in favor of protecting speech, rather than restricting and chilling it. The error in *McConnell* is just that fundamental. "If protected speech is being suppressed, that must be the end of the inquiry." *McConnell*, 540 U.S. at 324 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., dissenting). It "is no answer to say that" speakers "may bring as-applied challenges on a case-by-case basis. When a statute is as out of bounds as Section 203, our law simply does not force speakers to 'undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation.'" *Id.* at 336 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). The three-judge court below did the best it could in fleshing out the *McConnell* standard for employment in an as-applied challenge to Title II, and that effort yielded an eight-factor test through which political speakers must sift their speech before uttering a word. *Wisconsin Right to Life v. FEC*, 466 F. Supp. 2d 195, 204, 207 (D.D.C. 2006) (setting forth a 2-part, and then 6-subpart, test for applying *McConnell*). That the *McConnell* standard for distinguishing a felony from permissible speech is "unworkable" is

reason enough to depart from *stare decisis*. *Payne*, 501 U.S. at 827.

The Government nevertheless contends that BCRA's definition of "electioneering communications" passes constitutional muster because it employs bright (albeit broad and sweeping) lines to define "a class of communications that are generally intended to influence electoral outcomes and are likely to have that effect." SG Br. at 30. This makes for an alarming comparison with the class of criminal syndicalism communications that the State may outlaw, which is phrased in parallel terms: a state may criminalize incitement to violence only when the defendant's "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). That is a much narrower category of communication and a much tougher standard for the State to meet, despite the fact that advocating violence, in contrast to political speech, is not at the core of the First Amendment. Thus the Government's reading of *McConnell* is that the Constitution guarantees more elbow-room for a speaker to advocate the violent overthrow of the government than to advocate removal of that same government by means of the electoral process. This is a world turned upside down.

IV. TITLE II CANNOT BE JUSTIFIED BY THE NEED TO PREVENT *AUSTIN*-STYLE "CORRUPTION" BECAUSE CONGRESS ITSELF ENACTED A LESS RESTRICTIVE ALTERNATIVE.

Even if, contrary to what BCRA's legislative sponsors themselves said, preventing *Austin*-style "corruption" were the purpose of Title II, that purpose is insufficiently compelling to excuse the statute's abridgement of freedom

of speech because a less restrictive means of achieving the congressional goal is available. This is an alternative and independent basis for overruling *McConnell*.

Defendants do not (and cannot) dispute that Title II is subject to strict scrutiny, so they attempt to cast Title II as designed to achieve the compelling government purpose of preventing actual or apparent political corruption. But there is *absolutely nothing* in the legislative record of Title II indicating that Congress limited electioneering communications to protect office holders from the corrupting influence of "sham" issue ads. To the contrary, as demonstrated above, the statute was aimed at "negative attack ads" that supposedly demean the political process.

Despite Congress's remarkable candor about its goal of protecting candidates from televised criticism during election campaigns, the majority in *McConnell* ignored that purpose and instead launched its analysis "with rhetoric that suggests a conflation of the anticorruption rationale with the corporate speech rationale." 540 U.S. at 290 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., dissenting). "The conflation appears designed to cast the speech regulated here as unseemly corporate speech." *Id.* at 290-91. Thus "[t]he majority begins with a denunciation of direct campaign *contributions* by corporations and unions" and "then uses this rhetorical momentum as its leverage to uphold" BCRA's restrictions on *independent expenditures*, even by non-profit grassroots advocacy organizations. *Id.* at 339-40 (emphasis added). The Court should reexamine the basic premises of its analysis in *McConnell*.

A. Gratitude For Political Support Is Not Corruption.

The notion of "political corruption" that the majority embraced in *McConnell* is a world apart from the record of "*quid pro quo*" deals that anchored the Court's regulation of campaign contributions in *Buckley*. *See* 424 U.S. at 26 & n.28. For the *McConnell* Court, "*any* conduct that wins goodwill from or influences a Member of Congress" is *ipso facto* "corruption." 540 U.S. at 294 (Kennedy, J., dissenting) (emphasis added). This, we are told, is a matter of simple "common sense." *Id.* at 152 (joint opinion of Stevens and O'Connor, JJ.). Likewise, mere "access, without more," is proof positive of "corruption" that taints both the independent expenditures made in support of a candidate's policies and the candidate to whom the advocacy group making the expenditures gains access. *Id.* at 294 (Kennedy, J., dissenting). "Access, in the Court's view, has the same legal ramifications as actual or apparent corruption of officeholders." *Id.*

But this is not "corruption" – this is the democratic process. To be sure, elected officials are indeed grateful for any support for their campaigns, whether it takes the form of the ballot of a single constituent, or the endorsement of an organization with millions of members, or television ads extolling a candidate's virtues and decrying his opponent's vices. And those who provide such support do indeed expect that, if the campaign is successful, the official will cast votes in a way that reflects the shared political ideals that inspired the support in the first place.[8]

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[8] It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the

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But there is nothing "malign" in this, nor in the "proclivity of [an] officeholder to agree with those who agree with him, and to speak more with his supporters than his opponents." 540 U.S. at 259 (Scalia, J., dissenting). Political allies who raise their voices in support of particular causes and hence in support of a candidate who promotes those causes "will have greater access to the officeholder, and he will tend to favor the same causes as those who support him (which is usually *why* they supported him). That is the nature of politics – if not indeed human nature." *Id.*

Thus the *McConnell* Court saw "corruption" in the natural functioning of our representative democracy. Prior to *McConnell*, this Court had repudiated such a notion of "corruption." "The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *FEC v. NCPAC*, 470 U.S. 480, 498 (1985).

B. Independent Expenditures By Grassroots Advocacy Groups Pose No Threat Of Corrupting The Political Process.

Core political speech is protected by the First Amendment regardless whether a corporation is the speaker.

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only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

McConnell, 540 U.S. at 297 (Kennedy, J., dissenting).

Buckley, 424 U.S. at 45, 50, 187; *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978); *FEC v. MCFL*, 479 U.S. 238, 259 (1986). Indeed, *MCFL* upheld a nonprofit voluntary membership corporation's First Amendment right to make unlimited independent expenditures to fund its political speech, including express advocacy. Only once, in *Austin*, has this Court upheld a restriction on independent expenditures for core political speech. The specific danger identified in *Austin*, corruption of the political process through the aggregation of wealth generated by business corporations, has no application to speech by nonprofit membership organizations that are devoted to the advancement of specific rights and ideas and are funded almost exclusively by the dues and donations of individual members.

MCFL held that a voluntary membership organization committed to a political purpose does not lose its First Amendment rights simply by taking the corporate form. Although the "resources in the treasury of a *business corporation* . . . are not an indication of popular support for the corporation's political ideas," nonprofit advocacy groups that take the corporate form "do not pose that danger of corruption" because they are "formed *to disseminate political ideas, not amass capital*." 479 U.S. at 258-59 (emphasis added). Their "resources . . . are not a function of [their] success in the economic marketplace, but [their] popularity in the political marketplace." *Id.*

In contrast, *Austin* upheld a law restricting expenditures on express advocacy by the Chamber of Commerce because 75% of its funding came from for-profit corporations; the Chamber therefore could (and did) serve as a conduit for using "resources amassed in the economic marketplace" "to provide an unfair advantage in the

political marketplace." *MCFL*, 479 U.S. at 257. The Court specifically observed that the Chamber's corporate wealth had "*little or no correlation* to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660 (emphasis added).

MCFL and *Austin* thus draw a line between advocacy organizations that fund their speech with individual dues and trade associations that fund their speech largely with contributions from business corporations. The former, unlike the latter, pose no danger of corrupting the political marketplace through wealth generated in the economic marketplace.

This analysis of *Austin* and *MCFL* was confirmed in *FEC v. Beaumont*, 539 U.S. 146, 157-59 (2003), which held that a restriction on corporate campaign *contributions* could constitutionally be applied to nonprofit advocacy organizations as well as business corporations. *Beaumont* reaffirmed that the *Austin* rationale for restricting expenditures was to prevent corporations from "'us[ing] resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace.'" *Id.* at 154 (quoting *Austin*, 494 U.S. at 658-59). That problem is simply not presented by the NRA or similar nonprofit advocacy groups.

To be sure, *Beaumont* held that concerns about the corporate form of organization, even for a nonprofit advocacy organization funded by individual donations, were sufficient to sustain restrictions on campaign *contributions* by such a corporation. *Id.* at 159-61. In other words, Congress may ban corporate campaign contributions in order to "bar[] corporate earnings from conversion into political 'war chests.'" *Id.* at 154. But, as the Court reaffirmed,

contributions barely count as speech at all: "Going back to *Buckley v. Valeo*, restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment." *Beaumont*, 539 U.S. at 161.

In contrast, independent political *expenditures* on campaign speech by nonprofit advocacy groups constitute "the core of political expression." *Id.* at 161-62. Independent political expenditures "'do not pose that danger of corruption,'" *id.* at 158, and therefore the "'potential for unfair deployment of wealth for political purposes' f[alls] short of justifying a ban on expenditures" by such groups. *Id.* The rationales that sufficed to uphold restrictions on contributions in *Beaumont* cannot survive the strict scrutiny applicable to restrictions on expenditures for core political speech.[9] Indeed, that is precisely why the First Amendment foreclosed Congress's attempt to regulate the independent expenditures of a corporate political action committee ("PAC") in *NCPAC*. *See* 470 U.S. at 500-01.

The NRA is the archetype of the issue advocacy groups protected by the First Amendment. It was formed by its members to disseminate a shared political idea – preservation of Second Amendment rights – not to amass capital. The NRA's resources "are not a function of its success in the economic marketplace, but its popularity in

[9] *Beaumont* repeatedly reaffirmed this fundamental distinction between restrictions on contributions and expenditures. 539 U.S. at 151 & n.2, 155-56, 158-59, 161, 162. *See also id.* at 164 (Kennedy, J., concurring in the judgment). In particular, the Court distinguished the deference accorded legislative judgments about corruption "when Congress regulates campaign contributions" from the strict scrutiny applicable to expenditure restrictions. *Id.* at 155-56, 161.

the political marketplace." *MCFL*, 479 U.S. at 259. The NRA and similar grassroots advocacy organizations do not do significant business in the "economic marketplace," nor derive "market profits," nor receive more than a negligible portion of their revenues from corporate contributions. In short, the NRA does not use "'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" *Austin,* 494 U.S. at 659 (quoting *MCFL*, 479 U.S. at 259). Title II's restriction on its independent electioneering expenditures is, therefore, unconstitutional.

C. Title II's Restrictions On Independent Expenditures By Grassroots Advocacy Organizations Drastically Curtail Speech.

"The freedom to associate with others for the dissemination of ideas – not just by singing or speaking in unison, but by pooling financial resources for expressive purposes – is part of the freedom of speech." *McConnell*, 540 U.S. at 255 (Scalia, J., dissenting). *See also NAACP v. Button*, 371 U.S. 415, 428-29 (1963). "To say that [individuals'] collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *FEC v. NCPAC*, 470 U.S. 480, 495 (1985).

McConnell upheld Section 203 because corporations, including nonprofit advocacy organizations such as the NRA, the ACLU and the Sierra Club, "can still fund electioneering communications with PAC money," and it was therefore "'simply wrong' to view the provision as a

'complete ban' on expression rather than a regulation." 540 U.S. at 204.

First, this distinction gains no ground for the *McConnell* Court's rationale, because Title II is subject to First Amendment strict scrutiny, not to a mere balancing test. "When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression." *United States v. Playboy Entm't Group*, 529 U.S. 803, 826 (2000).

Second, the distinction between ban and burden drawn by the *McConnell* majority provides little comfort to advocacy organizations and marks yet another break with established doctrine. This Court's jurisprudence has long recognized "the practical difficulties corporations face when they are limited to communicating through PACs," 540 U.S. at 330 (Kennedy, J., dissenting), which are regulated in minute detail by federal law. *See MCFL*, 479 U.S. at 253-54. With respect to grassroots advocacy organizations in particular, the PAC rules constitute a stultifying array of accounting, reporting, solicitation and organizational requirements. "These regulations are more than mere minor clerical requirements. Rather they create major disincentives for speech, with the effect falling most heavily on smaller entities," and for any organization that has not yet established a PAC, spontaneous election speech "becomes impossible." *McConnell*, 540 U.S. at 332 (Kennedy, J., dissenting).

> Couple the litany of administrative burdens with the categorical restriction limiting PACs' solicitation activities to "members," and it is apparent

> that PACs are inadequate substitutes for corporations in their ability to engage in unfettered expression.

Id.

Title II's congressional supporters well understood that requiring the NRA to speak through its PAC would reduce the collective voice of its four million members to a whisper – indeed, they openly declared that gagging the NRA during elections was their purpose.[10] At the trial stage of *McConnell,* Judge Henderson found that the congressional stratagem would succeed, due to the inability of NRA members – the vast majority of whom are individuals of modest means – to pay the NRA's membership fee and then contribute beyond that amount to the NRA's PAC. *McConnell v. FEC*, 251 F. Supp. 2d 176, 318 (D.D.C. 2003) Judge Henderson's finding was not contested by either of the other members of the district court panel, nor questioned by any member of this Court.

Experience since *McConnell* has borne out Judge Henderson's forecast: grassroots advocacy associations comprising individuals of ordinary income have been effectively gagged, while multimillionaires – whose Section 527 organizations are not subject to Title II's restrictions – continue to flood the airwaves with their electioneering

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[10] *See* 147 CONG. REC. S2847 (Mar. 26, 2001) (Sen. Wellstone) (referencing the NRA and Sierra Club as prototypical organizations whose ads should be restricted); 145 CONG. REC. H3174 (May 14, 1999) (Rep. Schakowsky) ("If my colleagues care about gun control, then campaign finance reform is their issue so that the NRA does not call the shots."); 148 CONG. REC. H424 (Rep. Pickering) (Feb. 13, 2002) (quoting Scott Harshberger, the President of Common Cause, who championed BCRA by saying: " 'A vote for campaign finance reform is a vote against the second amendment gun lobby.' "); *see generally* LH App. 52a.

speech.[11] *Amicus* does not contend that the First Amendment requires government to level the playing field between rich and poor speakers, but neither does it permit government to suppress the collective speech of ordinary citizens while allowing plutocrats to broadcast as they wish. This Court has struck down even *contribution* limits when they were found to "severely inhibit collective political activity by preventing" a group from aggregating and "using contributions by small donors" to support a candidate, "thereby thwarting the aims" of thousands of individuals "from making a meaningful contribution to state politics." *Randall*, 126 S. Ct. at 2497 (Breyer, J., joined by the Chief Justice, and Alito, J.).

As Justice Kennedy pointed out, "political committees are regulated in minute detail because their primary purpose is to influence federal elections," whereas the "'ACLU and thousands of other organizations like it . . . are not created for this purpose and therefore should not be required to operate as if they were.'" *McConnell*, 540 U.S. at 332 (Kennedy, J., dissenting). The *McConnell* Court "articulate[d] no compelling justification for imposing this scheme of compulsory ventriloquism." *Id.* at 333.

Although some would justify limits on independent expenditures as necessary "to democratize the influence that money itself may bring to bear upon the electoral process," *Shrink Missouri*, 528 U.S. at 401 (Breyer, J., concurring), Title II stands that reasoning on its head. By

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[11] For an example of the vigorous spending and healthy state of fund-raising by advocacy corporations that qualify under 26 U.S.C. § 527, *see* http://www.fec.gov/finance/disclosure/norindsea.shtml (reporting individual contributions to MoveOn.org by George Soros in the amounts of $1,044,285, $955,715 and $500,000).

requiring a grassroots advocacy group's political speech to be channeled through a PAC, BCRA ensures that the voices of members of modest means will be silenced, closing the marketplace of political expression to all but the wealthy. Title II thus works a bitter inversion of the *Austin* Court's rationale. *Austin* upheld a limit on corporate campaign expenditures as justified to prevent wealth generated in the economic marketplace from unfairly *amplifying* the corporation's voice beyond the "public's support for the corporation's political ideas." 494 U.S. at 660. The NRA's wealth, like that of typical advocacy groups, is attributable to its success in the political marketplace, not the economic marketplace, and its general treasury "accurately reflects members' support for the organization's political views." *Id.* at 666. By requiring the NRA's political speech to be channeled through its PAC, Title II *muffles* the NRA's voice in the political marketplace to a volume far below its "contributors' support for the corporations' political views." *Id.* at 660-61. Thus, far from ensuring that "resources amassed in the economic marketplace [are not] used to provide an unfair advantage in the political marketplace," *MCFL*, 479 U.S. at 257, Title II ensures that resources amassed in the political marketplace cannot be put to use in the very place from whence they came.

Nor can Title II possibly achieve the congressional goal that the *McConnell* Court attributed to it. The Court proclaimed that electioneering communications are regulated by Title II because they beget the grievous public harm of official corruption, 540 U.S. at 206 n.88, while paradoxically positing that Title II actually bans no electioneering communications at all because corporations remain free to speak through their PACs. *Id.* at 204. But

requiring the electoral speech of corporations to be funneled through their PACs cannot possibly solve the "corruption" problem that *McConnell* identifies as the animating purpose of Section 203. As a measure designed to prevent official corruption, of either the *quid pro quo* or the *Austin*-"gratitude" variety, Title II makes no more sense than a bribery statute requiring corporations to pay for their bribes using funds from PACs. *See McConnell*, 540 U.S. at 275 n.8 (Thomas, J., dissenting). Congress surely did not intend Title II to result in nothing more than an act of institutional ventriloquism, with organizations like the NRA simply uttering from the mouths of their PACs the very same "electioneering communications" that allegedly threatened to corrupt federal office holders. Moreover, *McConnell* fails to explain why a candidate would be any less grateful for, and thus any less corrupted by, an issue ad aired with PAC money than an identical ad aired with a non-profit advocacy group's general funds.

Thus Title II cannot genuinely be justified on an anticorruption rationale, and overruling *McConnell* would not "depart from the fabric of the law; [it would] restore it." *Adarand*, 515 U.S. at 234.

D. The Wellstone Amendment's Suppression Of Political Speech Funded Exclusively With Individual Contributions Cannot Survive Strict Scrutiny Because It Is Not The Least Restrictive Means Of Achieving The Congressional Purpose.

Even if one credits at face value *McConnell*'s premise that the specter of *Austin*-type corruption extends to the independent electioneering expenditures of nonprofit advocacy groups, the case should nevertheless be overruled

insofar as it upholds Sections 203 and 204 of BCRA. Under strict scrutiny, resort to a less restrictive alternative is mandated if one is available. *See Playboy Entertainment*, 529 U.S. at 809-810; *Shrink Missouri*, 528 U.S. at 388 n.3; *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). And "the burden is on the Government to prove that the proposed alternatives would not be as effective as the challenged statute." *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). There are less restrictive means to ensure that the political voices of advocacy groups like the NRA are not unfairly amplified by corporate wealth generated in the economic marketplace.

Indeed, Congress enacted a less restrictive alternative in Title II itself: the original "Snowe-Jeffords" version of Title II would have exempted electioneering communications by 501(c)(4) advocacy groups like the NRA, so long as they were "paid for exclusively by funds provided directly by individuals." BCRA § 203(b) (adding to U.S.C. § 441b(c)(2)). The so-called "Wellstone Amendment," however, negated the Snowe-Jeffords Provision, *see* § 204 (adding 2 U.S.C. § 441b(c)(6)), for the specific purpose of extending Title II to nonprofit issue advocacy organizations.

The Incumbent Intervenors and BCRA's other sponsors *opposed* the Wellstone Amendment, not because they valued the political speech of the grassroots advocacy groups that the Amendment would stifle, but because they believed that the Amendment was unconstitutional and would likely be struck down by this Court.[12] BCRA's

[12] All four of the Senator-Intervenors voted *against* the Wellstone Amendment, *see* LH App. 41b-42b, and Senator Feingold expressly did so on constitutional grounds. *See* LH App. 58a, 63a.; 147 CONG. REC.

(Continued on following page)

opponents overwhelmingly supported the amendment, presumably for this very reason. BCRA's sponsors therefore insisted both that a severability clause be enacted and that the original Snowe-Jeffords language remain in the bill, so that invalidation of the Wellstone Amendment would not threaten Title II as a whole. And when Section 204 was challenged in *McConnell*, the Government refused to defend its curtailment of electioneering communications by 501(c)(4) organizations and instead merely sought to avoid consideration of it. *See* Brief of the FEC in No. 02-1674, at 112-13.

Ironically, the *McConnell* Court upheld the Wellstone Amendment by reading into it an exception for *MCFL*-type corporations, despite the fact that, as the Court itself conceded, Section 204 "does not, on its face, exempt *MCFL* organizations from its prohibition," and despite Congress's evident intent to override *MCFL* by broadening BCRA to include issue-advocacy groups. 540 U.S. at 210-11. *See also id.* at 338-39 (Kennedy, J., dissenting) ("There is no ambiguity regarding what § 204 is intended to accomplish. . . . [T]he Wellstone Amendment could be understood only as a frontal challenge to *MCFL*").

The *McConnell* decision thus marks the first time in our Nation's history that the Court has sanctioned a content-based restriction on core political speech funded by an association of like-minded individuals – and the Court did so *gratuitously*, because the less restrictive alternative of Section 203(b) was readily at hand.

S3073 (Mar. 29, 2001) (statement of Sen. Feingold); 147 CONG. REC. S2833 (Mar. 23, 2001) (statement of Sen. Edwards).

Prior to *McConnell*, this Court's teaching was that Congress may require that a corporation's expenditures bear a meaningful "correlation" to, *Austin*, 494 U.S. at 660, or constitute a "rough barometer" of, public support for that corporation's political views. *MCFL*, 479 U.S. at 258. The original Snowe-Jeffords approach, preserved in Section 203(b), accomplished that by confining the electioneering expenditures of nonprofit advocacy organizations to the amount of contributions they received from individual donors. In contrast, the Wellstone Amendment, by preventing such organizations from engaging in any "electioneering communications" for fear that a single corporate dollar might otherwise lend indirect assistance, suppresses far more speech than necessary to achieve the goals vindicated in *Austin* and *MCFL*. With the less restrictive alternative of the Snowe-Jeffords provision at hand, Section 204 cannot survive strict scrutiny.

CONCLUSION

This Court should reconsider *McConnell* and invalidate either Title II's prohibition of electioneering communications or, alternatively, the Wellstone Amendment.

Respectfully submitted,

CHARLES J. COOPER
BRIAN S. KOUKOUTCHOS
DAVID H. THOMPSON
COOPER & KIRK, PLLC
555 Eleventh Street, N.W.
Suite 750
Washington, DC 20004
(202) 220-9600

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(1) (2)

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IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC., *et al.*,

Appellees.

McCAIN,

Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICI CURIAE* OF NORMAN DORSEN, ARYEH NEIER, BURT NEUBORNE, AND JOHN SHATTUCK IN SUPPORT OF APPELLANTS

BURT NEUBORNE
Counsel of Record
DEBORAH GOLDBERG
DAVID GANS
BRENNAN CENTER FOR JUSTICE
AT NYU LAW SCHOOL
161 Avenue of the Americas
12th Floor
New York, New York 10013
(212) 998-6730

Attorneys for Amici Curiae

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Santa Fe Indep. School Dist. v. Doe,
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Virginia v. Black, 538 U.S. 343 (2003).....9

Watts v. United States, 394 U.S. 705 (1969).....9

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Wisconsin Right to Life, Inc. v. FEC, No. 04-1260, 2006 WL
3746669 (D.D.C. Dec. 21, 2006).....*passim*

Other Sources

William Shakespeare, *The Tragedy of Julius Caesar*, act III,
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STATEMENT OF INTEREST

Amici are former officials of the American Civil Liberties Union ("the ACLU"), who are committed both to a robust First Amendment and to the effective restriction of corporate treasury funds in electoral campaigns.[1] Norman Dorsen served as President of the ACLU from 1976-1991, and as its General Counsel from 1969-1976. He is currently Stokes Professor of Law at New York University School of Law. Aryeh Neier served as Executive Director of the ACLU from 1973-1981. He is currently President of the Open Society Institute. John Shattuck served as Director of the ACLU's Washington, D.C., office, and as a National Staff Counsel from 1971-1984. He is currently Executive Director of the JFK Library Foundation. Burt Neuborne served on the legal staff of the ACLU for eleven years, serving as National Legal Director from 1981-1986. He is currently Inez Milholland Professor of Civil Liberties at New York University School of Law. *Amici* urge this Court to reaffirm the balance of constitutional interests that it struck in *McConnell v. FEC*, 540 U.S. 93 (2003), and *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), by reversing the decision of the court below.

SUMMARY OF ARGUMENT

In recent years, the battle over whether corporations may use treasury funds to affect the outcome of federal elections has taken the form of a strategic game between challengers and defenders of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Both sides have sought to exploit an alleged

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[1] All parties have consented to the filing of this brief. Copies of their written consents have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for a party has authored any part of this brief, and no one other than *Amici* or their counsel has made a monetary contribution to its preparation or submission.

difficulty in distinguishing "electioneering speech" (subject to regulation) from "issue speech" (protected from regulation), in an effort to advance their polar views. Proponents of corporate-funded electioneering have argued that, in order to preserve constitutionally protected issue speech, a broad loophole must be opened in section 203 of BCRA ("Section 203"), insulating from regulation speech that qualifies as "electioneering communications" as long as the literal text of advertising avoids an explicit call to electoral action. Conversely, opponents of corporate-funded electoral speech have argued that, in order to preserve the effective prohibition of corporate-funded electioneering, it is necessary to tolerate the restriction of at least some corporate-funded issue speech.

This Court has rejected both extremes. In *McConnell*, this Court upheld the facial constitutionality of Section 203, ruling that corporations do not enjoy a First Amendment right to expend treasury funds on electioneering speech. The ruling followed almost 30 years in which corporations enjoyed an unfettered *de facto* right to use treasury funds to influence federal campaigns, as long as their advertising avoided "magic words" of express advocacy. Congress enacted Section 203 to close that loophole, which had permitted an avalanche of corporate campaign spending, and the *McConnell* Court sustained the provision. But this Court recognized in *WRTL I* that an as-applied exemption from Section 203 might be constitutionally compelled in the context of genuine issue speech at the periphery of the electoral process. *See infra* Point I.

In granting as-applied relief without a full review of the factual context, the District Court turned the law of as-applied challenges on its head. The decision below ignored the purpose of an as-applied challenge, which is designed to permit a fact-specific analysis of plaintiff's particular circumstances. *See infra* Point II (A). The District Court's

assertion that consideration of the facts would be administratively unworkable and might "chill" protected corporate speech ignores the fact that courts routinely consider context in First Amendment cases, and that a well-defined procedure exists for determining whether the presumption of coverage established by the probative weight of the criteria set forth in Section 203 has been rebutted. *See infra* Point II(B).

Viewed in factual context, this is an easy case. Wisconsin Right to Life, Inc. ("WRTL") used corporate treasury funds to finance three advertisements criticizing Senator Feingold's position on President Bush's judicial nominees, and broadcast the advertisements in the months leading up to Senator Feingold's re-election bid. The advertisements directed listeners to a website explicitly opposed to Senator Feingold's re-election and were part and parcel of a long campaign by WRTL to oust Senator Feingold. Regulating these ads under BCRA advances the compelling state interests recognized in *McConnell*. WRTL simply has no right to a First Amendment exemption that would enable it to use corporate treasury funds for electioneering communications at the core of the electoral process. *See infra* Point II(C)(1).

Finally, the District Court's insistence on granting an as-applied exemption from Section 203, based solely on the absence of explicit words of electoral exhortation in the text of a corporate-funded advertisement, threatens to undercut Congress's statutory scheme and to destabilize the careful First Amendment balance established by this Court. In the guise of adjudicating WRTL's as-applied challenge, the District Court resuscitated the very "magic words" doctrine that Congress and this Court had rejected, effectively permitting an end run around the doctrine of *stare decisis*. *See infra* Point II(C)(2).

This appeal represents the latest round of gamesmanship among parties seeking to upset the terms of BCRA as sustained by this Court in *McConnell* and *WRTL I*. *Amici* urge the Court to reject the lower court's swing from one extreme to the other, to reaffirm longstanding ground rules for as-applied challenges, and to bring the strategic game to an end.

ARGUMENT

I. This Court Should End the Strategic Game Played by Both Sides in the Litigation Leading to this Appeal.

Since the passage of Section 203, proponents and opponents of corporate electioneering have been engaged in a strategic game, with each side attempting at some point to establish an extreme constitutional position. Proponents of corporate-funded electioneering are eager to carve a gaping loophole in BCRA in the name of preserving constitutionally protected issue speech. Opponents of corporate-funded electoral speech have been prepared to countenance restrictions on some issue speech in the name of preserving the statute. This Court should continue to reject both extremes, as it did in *McConnell* and *WRTL I*, and put the game to rest with this appeal.

The complaint in *McConnell* opened the first round of the strategic game. Before the ink was dry on Section 203, which bans corporate expenditures of more than $10,000 to fund "electioneering communications"—broadcast, cable, or satellite ads, aired within a fixed period before a federal election, that refer to a candidate in that election and target the candidate's constituents—challengers argued that the statute was facially unconstitutional because the provision might preclude corporate funding of some genuine issue speech.

The *McConnell* Court refused to take the bait, holding that the possibility that Section 203 might apply to some forms of corporate-funded "issue speech" did not require facial invalidation of the ban on corporate-funded "electioneering communications." Instead, applying strict scrutiny, *McConnell* held that Congress had a compelling state interest in preventing corporations from building and spending political war chests on federal elections, and that this interest justified the ban on the use of corporate general treasury funds to pay for election-influencing advertisements, even if the ads did not use "magic words" expressly advocating the election or defeat of a clearly identified candidate. *McConnell*, 540 U.S. at 205-06. The Court noted that thirty years of experience with the "magic words" test had demonstrated its vulnerability to evasion. *Id.* at 126-28, 193-94.

The Court's second encounter with Section 203, and the second round in the strategic game, took place in *WRTL I*, when this Court unanimously rejected the argument that *McConnell* precluded as-applied challenges to Section 203 in any setting where corporate-funded speech satisfied the statute's definition of "electioneering communications." That argument, made by BCRA's defenders, was the mirror image of the challengers' argument in *McConnell*; this time concern over preserving the prohibition on corporate-funded "electioneering communications" was deployed as a justification for banning at least some corporate-funded "issue speech." This Court once again refused the bait, stating: "In upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges." 546 U.S. at 410.

The strategic game resumed on remand in the court below, when respondent Wisconsin Right to Life, Inc. ("WRTL"), a non-profit corporation that receives substantial funding from for-profit corporations, re-asserted its claim that three radio

advertisements that aired for the first time in the months prior to Senator Feingold's 2004 bid for re-election qualified for an as-applied exemption from BCRA. *Wisconsin Right to Life, Inc. v. FEC*, No. 04-1260, 2006 WL 3746669 (D.D.C. Dec. 21, 2006) ("*WRTL II*"). The advertisements, costing more than $10,000, carefully eschewed any "magic words" of explicit electoral exhortation, but criticized Senator Feingold's position on President Bush's judicial nominees and urged listeners to contact the Senator's office in connection with the Senate's failure to vote on those nominees. *Id.* at *1 & nn.3-5. WRTL argued that because the advertisements carefully avoided explicit electoral exhortation, they were constitutionally immune from Section 203's ban on corporate funding, notwithstanding their implicit criticism of Senator Feingold, their timing to coincide with the impending election, WRTL's well-known record of opposition to the Senator's re-election, and other powerful contextual evidence demonstrating that the purpose and perceived effect of the advertisements were to diminish the Senator's electoral prospects. *Id.* at *6.

In *WRTL II*, a two-person majority of the District Court refused to consider the advertisements' factual context in assessing their principal purpose and perceived effect. Instead, despite Congress's rejection of the "magic words" approach, and this Court's decision in *McConnell*, the District Court granted an as-applied exemption from BCRA because the four corners of the text did not contain "magic words" of electoral exhortation. *Id.* On appeal from *WRTL II*, the strategic game continues. While WRTL professes concern about corporate-funded "issue speech," its evident purpose is to open a massive loophole in Section 203, eviscerating Congress's ability to ban corporate-funded "electioneering speech" at the electoral core.

Amici urge the Court to reject, for the third time, the invitation to choose between over- and under-regulation of

corporate-funded electoral speech. *Amici* believe that the strategic game should end. It is past time to get down to the business of developing workable criteria designed to carry out the First Amendment balance established in *McConnell* and *WRTL I*.

II. WRTL's Adverstisements Do Not Qualify for an As-Applied Exemption from Section 203's Ban on Corporate Funding of "Electioneering Communications."

The District Court's "four corners" approach—turning a blind eye to context—hardly qualifies as a serious effort to respect the First Amendment balance struck in *McConnell*. The District Court held that the literal text of an advertisement is the sole determinant of whether it may be funded by corporate treasury funds. Contextual evidence bearing on: (i) the purpose of WRTL and its for-profit corporate donors; and (ii) the perceived meaning of the advertisements' clearly implied electoral message, may not be considered, held the District Court, because such a fact-intensive approach, would "chill" protected speech and prove difficult to administer in the waning days of a campaign. *See WRTL II*, 2006 WL 3746669, at *6-8. The District Court's analysis is triply flawed.

A. The District Court Plainly Erred in Refusing To Consider the Factual Context of the Advertisements.

Close analysis of facts and circumstances is the very hallmark—indeed, the *raison d'etre*—of an as-applied challenge. Unlike a facial challenge, which views a statute's constitutionality from the perspective of a run-of-the-mill target, an as-applied challenge focuses on the particularized facts and circumstances of a single litigant in deciding whether a law that may be validly applied to most persons must be suspended in the factual context before the Court.

An as-applied challenge is, therefore, necessarily fact-intensive, requiring a party to place evidence before the court justifying a constitutionally-driven individualized exemption. *See, e.g.*, *United States v. American Library Ass'n*, 539 U.S. 194, 215 (2003) (Kennedy, J., concurring) (rejecting facial challenge but permitting individuals to bring as-applied challenges based on specific, concrete factual showing); *Boy Scouts of America v. Dale*, 530 U.S. 640, 648-54 (2000) (concluding that specific facts had been adduced showing that application of anti-discrimination statute imposed substantial burden on the litigant's freedom to associate); *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring) (calling for District Court to make "detailed factual findings" about program's administration in adjudicating an as-applied Establishment Clause challenge to financial aid statute); *id.* at 625 (Kennedy, J., concurring) (insisting on specific evidence about how religious entities "spend [their] grant[s]" to adjudicate an as-applied challenge); *see also Sabri v. United States*, 541 U.S. 600, 609 (2004) (preferring as-applied to facial challenges because the latter "carries too much promise of 'premature interpretatio[n] of statutes' on the basis of factually bare-bones records" (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960))). Indeed, the intensely fact-specific nature of an as-applied challenge is why this Court insists on conducting an independent *de novo* review of the record to ensure that improper fact finding does not lead to a denial of constitutional rights. *See Boy Scouts*, 530 U.S. at 648-49; *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

The District Court's refusal to consider the factual context in deciding whether to grant an as-applied exemption turns as-applied jurisprudence on its head. In effect, the District Court granted a facial exemption from a facially valid statute, an incoherent approach that undermines the very statute the court purports to apply. It is one thing to recognize, as this Court did in *WRTL I*, that as-applied challenges remain open;

it is quite another to say, as the District Court did, that a court should consider an as-applied challenge without undertaking a full review of the facts and circumstances of the advertisements allegedly entitled to a constitutional exemption.

This Court's First Amendment jurisprudence precludes the District Court's analysis. In numerous First Amendment contexts, this Court considers both the text of the speech in question, as well as the broader context surrounding the speech, in determining whether or not to extend constitutional protection. For example, the Court regularly examines contextual evidence in determining: (i) whether an individual's communicative conduct constitutes protected symbolic speech, *see Texas v. Johnson*, 491 U.S. 397, 405-06 (1989); *Spence v. Washington*, 418 U.S. 405, 410-11 (1974); (ii) whether a public employee's political remarks or private defamatory speech involved matters of public concern, *see Rankin v. McPherson*, 483 U.S. 378, 384-85, 386-87 (1987); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985); and (iii) whether a communication is protected speech or an unlawful threat or exhortation to violence, *see Virginia v. Black*, 538 U.S. 343, 360, 362-63 (2003); *Hess v. Indiana*, 414 U.S. 105, 106-09 (1973); *Watts v. United States*, 394 U.S. 705, 708 (1969); *see also Milk Wagon Drivers of Chicago, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941) ("[An] utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.").[2]

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[2] Likewise, in determining whether government-sponsored religious expression violates the Establishment Clause, the Court examines not merely the religious expression the government has sponsored but the larger context of that speech. *See Van Orden v. Perry*, 545 U.S. 677, 691 (2005); *id.* at 699-704 (Breyer, J., concurring); *Santa Fe Indep. School*

The lesson of this long line of cases is that, often, the literal words a speaker utters, considered alone, do not adequately capture the relevant First Amendment considerations. To use a famous literary example, the literal text of Marc Antony's oration at Caesar's funeral said one thing, while the context said another. *See* William Shakespeare, *The Tragedy of Julius Caesar* act III, sc. ii. In short, the District Court's refusal to consider context would strip the regulatory process of adequate tools to protect federal electoral campaigns from sophisticated corporate-funded communications having the clear purpose and perceived effect of supporting or opposing a candidate for public office.

B. The District Court's Refusal To Consider Factual Context Was Not Required by Administrative Necessity or a Concern with "Chilling" Corporate-Funded Political Speech.

The massive congressional record compiled in connection with the enactment of Section 203, the thorough record compiled by the District Court in *McConnell*, and this Court's recognition in *McConnell* of the failure of the bright-line "magic words" test adopted in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), provided the court below with an unmistakable warning that granting as-applied exemptions solely on the basis of the literal text would seriously weaken, perhaps destroy, the regulatory scheme. The *WRTL II* majority argued, nevertheless, that the practical difficulty in assessing factual context under the time pressures of a political campaign, coupled with a concern that some corporate speakers might be "chilled," forced the court to

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Dist. v. Doe, 530 U.S. 290, 307-08 (2000); *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (O'Connor, J., concurring).

adopt a less-than-optimal approach. *See WRTL II*, 2006 WL 3746669, at *7-8. The District Court's twin justifications for banishing contextual evidence from its as-applied analysis fall apart on close scrutiny.

1. Courts Are Competent To Consider Context in Evaluating As-Applied Challenges.

Courts are perfectly competent to consider contextual factual material in connection with the resolution of a request for an as-applied exemption from Section 203. This Court's election law jurisprudence is replete with the duty to conduct precisely the fact-intensive analyses that the court below sought to avoid.

For example, *McConnell* holds that minor parties can claim a constitutional exemption from BCRA's soft-money ban by showing that the ban on receiving or spending soft money "prevents it from 'amassing the resources for effective advocacy,'" *McConnell*, 540 U.S. at 159 (quoting *Buckley*, 424 U.S. at 21), a test that is nothing if not fact-intensive. A similar standard applies if a litigant wishes to mount an as-applied challenge to BCRA's ban on soft money contributions to state and local political parties. *See id.* at 173 (requiring as-applied challenger to show that the ban's effect on contributions "is 'so radical in effect as to . . . drive the sound of the [recipient's] voice below the level of notice'" (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 397 (2000))).

In the same vein, *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), holds that a minor party will be entitled to as-applied relief from a campaign finance disclosure statute if it can show a reasonable probability that disclosure will lead to threats, harassments, and reprisals. *Id.* at 91-93, 98-101. This sort of fact-intensive analysis applies, as well, in other areas of this Court's

election law constitutional jurisprudence. *See Miller v. Johnson*, 515 U.S. 900, 910-13 (1995) (imposing fact-intensive purpose analysis in challenge to drawing of racially-gerrymandered districts); *Anderson v. Celebrezze*, 460 U.S. 780, 789-91, 792-93 (1983) (mandating fact-intensive undue burden analysis in First Amendment challenge to laws regulating access to the ballot).

Judged against this mass of precedent, the District Court's conclusion that readily available contextual evidence should be ignored in assessing as-applied challenges to BCRA's corporate electioneering ban was manifest error. In fact, compared with the fact-intensive inquiries the Court has mandated in other campaign finance and election law settings, the contextual factual issue in this case was child's play. Given the ads' implicit criticism of Sen. Feingold, WRTL's long-standing hostility to Senator Feingold, the group's open opposition to him in the website to which the ads directed listeners, and the suspicious timing of the so-called "grassroots lobbying," it is simply impossible for any reasonable finder of fact to review the record in this case and conclude that an as-applied exemption is constitutionally required under *McConnell*.

Given the overwhelming contextual record, this case is easy. Adequate procedures exist to deal swiftly and surely with harder cases, as well. As this Court noted in *McConnell*, the combined probative weight of the objective indicia for coverage in Section 203—(i) broadcast, cable, or satellite advertising costing more than $10,000; (ii) within a fixed period of a federal election; (iii) that refers to a clearly identified candidate in the forthcoming federal election; and (iv) targets the candidate's constituents—creates a powerful factual inference that the speech has both the purpose and perceived effect of supporting or opposing a candidate for federal office. *McConnell*, 540 U.S. at 206 (observing that the vast majority of covered ads had an electioneering

purpose); *see also id.* at 127 ("[T]he conclusion that [supposed issue] ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election."). At a minimum, therefore, the inherent probative weight of the four indicia satisfies the government's burden of production on the issues of the communication's purpose and perceived effect. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The essence of an application for an as-applied exemption from such presumptively constitutional regulation is the presentation of factual evidence tending to rebut the presumption. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Batson v. Kentucky*, 476 U.S. 79 (1986). At a minimum, an application for an exemption must be accompanied by admissible evidence tending to support the exemption, generally a sworn statement by the speaker that the advertisement does not have the purpose of supporting or opposing the candidate mentioned in the advertisement. *See Burdine*, 450 U.S. at 254-55 & n.9. In addition, the exemption application should be accompanied by admissible evidence tending to prove that the advertisement is not and will not be perceived as thinly-disguised electioneering speech. Once an applicant for an exemption has presented evidence tending to prove lack of purpose and perceived effect, the evidence may be rebutted, after which the District Court must make a finding of fact. In this case, given the overwhelming factual record, the issue simply is not in doubt. WRTL intended its corporate-funded advertisements to harm Senator Feingold's re-election efforts. Given the contextual record, no reasonable finder of fact could rule otherwise.

2. Consideration of the Factual Context Does Not Threaten Constitutionally Protected Issue Speech.

Such a classic fact-finding procedure poses no danger of "chilling" genuine corporate-funded "issue speech." It is simply unrealistic to assume that corporate speakers—hardly the most vulnerable of persons—will refuse to air genuine corporate-funded issue advertisements simply because a court adjudicating an as-applied challenge will consider not only the literal text, but the organization's past history of supporting or opposing the candidate specifically identified in the ad or the ad's referral of the viewer (or listener) to other unquestionably electoral exhortations, as well as the timing and targeting of the advertisement. Such a procedure will deter (as it should) only those who wish to air corporate-funded electioneering ads masquerading as issue ads in an effort to influence the outcome of elections. Under *McConnell*, such persons have no right to relief.

C. Viewed in Factual Context, WRTL's Advertisements Do Not Qualify for an As-Applied Exemption from Section 203's Ban on Corporate Electioneering.

This Court's precedents leave no doubt about the standard to be applied in an as-applied challenge to the application of a facially constitutional statute. A reviewing court must first decide whether a ban on corporate funding of the advertisements in question would advance the compelling governmental interests recognized by the Court in *McConnell* and earlier precedents of this Court. *See McConnell*, 540 U.S. at 205; *FEC v. Beaumont*, 539 U.S. 146, 161 (2003); *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). Second, if granting an as-applied exemption would significantly undermine BCRA's constitutional statutory scheme, the as-applied challenge must fail. *E.g.*, *United States v. Edge Broad. Co.*, 509 U.S.

418 (1993) (refusing to grant as applied exemption from broadcasting ban because of impact on facially valid regulatory scheme); *United States v. Lee*, 455 U.S. 252, 259-60 (1982) (refusing to exempt Amish employers from paying social security taxes despite substantial burden on their free exercise rights because exemption would compromise social security system).

1. Precluding WRTL's Ads Furthers the Compelling State Interests Recognized in *McConnell*.

Applying the proper standards, this is an easy case for rejecting the application. WRTL's advertisements are virtual replicas of the phony issue ads BCRA was designed to eliminate. The advertisements use implicit criticism to tell the electorate to oppose Senator Feingold and the policies with which he is identified. The compelling state interests *McConnell* recited in rejecting the facial challenge to a ban on corporate-funded electioneering speech—interests in preserving the integrity of the electoral process, combating real and perceived corruption, and preventing the circumvention of BCRA's contribution limits—fully support BCRA's application to WRTL's anti-Feingold advertisements.

McConnell emphasized two points in finding that a ban on corporate electioneering satisfied strict scrutiny. First, the *McConnell* Court noted that forbidding corporations from using treasury funds to pay for election-related political advertisements imposes a limited speech burden since corporations remain free to express any political viewpoint they choose, as long as corporate PAC money is used to pay for the speech.

> "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds

> with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through regulation and disclosure without jeopardizing the associational rights of advocacy organizations' members."

McConnell, 540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 163).

Second, *McConnell* held that BCRA's ban on corporate-funded electioneering speech is justified by two well-recognized compelling state interests. The ban ensures that corporations do not use the benefits of the corporate form to amass and spend political war chests capable of destabilizing the democratic process. *Id.* at 205; *see also Beaumont*, 539 U.S. at 153-55 (collecting cases); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-59 (1990) ("[S]tate-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" (quoting *MCFL*, 479 U.S. at 257)); *FEC v. National Right to Work Comm.*, 459 U.S. 197, 207 (1982) ("[S]ubstantial aggregations of wealth amassed by the special advantages of the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators . . . .").

The ban also prevents circumvention of limits on individual contributions to candidates—laws this Court has repeatedly upheld against First Amendment challenge—through the artifice of diverting money through the corporation. *See McConnell*, 540 U.S. at 205 ("[R]ecent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against 'circumvention of [valid] contribution limits.'" (quoting *Beaumont*, 539 U.S. at 155)).

The text of the advertisements at issue here and two pieces of objective and undisputable contextual evidence demonstrate that WRTL's ads were designed to affect, and were perceived as designed to affect, electoral outcomes. Indeed, they are exactly the kind of sham issue ads BCRA was enacted to prevent. In the guise of discussing a political issue, they criticize one candidate's voting record on a controversial issue, and urge action directed at the candidate, clearly suggesting that he should not be re-elected. Moreover, what was implicit in the text of the advertisement was made explicit in the website to which the ad directed viewers. That site, as the dissenting judge below observed, featured alerts that "excoriat[ed]" Senator Feingold for his filibustering of President Bush's judicial nominees and urged the Senator's defeat. *WRTL II,* 2006 WL 3746669, at *14 (Roberts, J., dissenting).

McConnell itself confirms that this kind of ad, which criticizes the political stances of a candidate and asks the voters to contact him or her, is tantamount to expressly advocating the criticized candidate's defeat. "Little difference exist[s] . . . between an ad that urge[s] viewers to 'vote against Jane Doe' and one that condemn[s] Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *McConnell,* 540 U.S. at 126-27; *see also id.* at 170 ("[A]ny public communication that promotes or attacks a clearly identified candidate directly affects the election in which he is participating."); *id.* at 193 ("[A]lthough the . . . advertisements do not urge the viewer to vote for or against the candidate in so many words, they are no less clearly intended to influence the election.").

The timing of WRTL's broadcast of the ads, which *McConnell* itself treats as probative, *see id.* at 127, further supports the conclusion that WRTL broadcast these three advertisements to convince Wisconsin voters not to re-elect

Sen. Feingold. The three advertisements at issue here were the only advertisements that WRTL broadcast concerning the filibustering of judicial nominees during the whole of the controversy over confirmation of President Bush's judicial nominees. As the dissent below observed, WRTL began broadcasting the ads on July 26, 1994, *after* the last of the judicial filibuster cloture votes in that session, and *after* the Senate had recessed for six weeks, *see WRTL II*, 2006 WL 3746669 at *16 (Roberts, J., dissenting), but just in time to tee up a challenge to BCRA. Further, WRTL did not broadcast any advertisements concerning filibustering after Senator Feingold's re-election in November 2004, even though the same group of Senators continued to filibuster President Bush's nominees. *Id.* The timing of the ads thus confirms what is implicit in the text: these ads were aimed at defeating Senator Feingold's re-election bid.

Finally, WRTL has long opposed Senator Feingold and its PAC has long supported his political opponents. As the dissent pointed out, WRTL made Senator Feingold's defeat a "priority" and in 2004 declared its "resolve to do everything possible to win Wisconsin for President Bush and send Russ Feingold packing!" *Id.* at *15-16. Broadcasting these three advertisements was part and parcel of WRTL's strategy to defeat Senator Feingold. That is why it ran the ads encouraging voters to tell Senator Feingold to change his policy, and did so toward the end of the election cycle rather than when Congress was in session and actually voting on the filibusters of judicial nominees about which WRTL claims to be so concerned. Under *McConnell*, BCRA may—indeed, must—be applied to these ads, which undoubtedly, were "intended to influence the voters' decision and [had] that effect." *McConnell*, 540 U.S. at 206.

2. Granting the As-Applied Exemption Sought by WRTL Would Undermine the Statutory Scheme Upheld in *McConnell*.

The District Court's judgment should be reversed for a second reason. The District Court never considered the effect of granting an as-applied exemption on the facts of this case on the statutory scheme upheld in *McConnell*. The lower court simply ignored the fact that the exemption it created would decimate BCRA's statutory scheme, leaving a gaping hole that would frustrate the compelling state interests *McConnell* recognized. That effect, alone, supports rejection of the WRTL's as-applied challenge.

In the final analysis, the District Court's opinion rests on dissatisfaction with the *McConnell* Court's refusal to erect a bright-line rule for as-applied challenges similar to the discredited "magic words" test. Instead of seeking to implement the *McConnell* Court's directive to work out a First Amendment balance, the District Court's reasoning upsets that balance and re-establishes an unworkable scheme that severely undercuts the holding of *McConnell* itself.

Upholding WRTL's as-applied challenge would vitiate the statutory scheme that *McConnell* adjudged valid. It would mean that WRTL and any other corporate entity could run virtually any corporate-funded campaign advertisements it wished—free from even a duty to disclose—so long as it chose the words of its ads carefully and criticized the candidates it opposed in coded language, rather than direct attacks. Such a ruling would create a hole in BCRA's scheme big enough to drive a truck through and would effectively reinstate the flawed "magic words" approach that BCRA repudiated. As the Court's as-applied jurisprudence has made clear time and again, courts should not radically remake valid statutory schemes in the guise of vindicating as-applied claims. Plaintiffs should not be permitted to parlay an overly

broad as-applied challenge into an end-run around the doctrine of *stare decisis*.

The Court's cases make clear that while an as-applied challenge is an appropriate way to trim the unconstitutional fat from a statute; it may not to be used to vitiate an otherwise constitutional statutory scheme. In *United States v. Lee*, 455 U.S. 282 (1982), the Court rejected an as-applied challenge brought by an Amish employer who refused to pay social security taxes in accordance with the dictates of his religion. Applying strict scrutiny (then the prevailing constitutional test), the Court held that recognizing an as-applied exemption risked vitiating the compelling state interests underlying the tax statute. Accommodating the Amish employer, the Court held, would "unduly interfere with fulfillment of [a compelling] governmental interest," *id.* at 259, because it would open the door to a wide range of religious-based exemptions incompatible with a mandatory tax system. *Id.* at 259-60 ("[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs.").

Likewise, in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), the Court rejected an as-applied challenge by a North Carolina radio station owner who sought to broadcast lottery advertisements in violation of a federal statute prohibiting advertisements by stations in jurisdictions, such as North Carolina, that do not sponsor a lottery. Edge claimed that it was entitled to a constitutional exemption because it was located three miles from the border with Virginia, which sponsored a lottery, and because Virginians constituted virtually of all its listening audience.

In rejecting Edge's as-applied challenge, the Court emphasized that it could not consider Edge's as-applied claim in isolation; it had to consider the system-wide effects

of granting Edge and all other similar-situated persons a constitutional exemption. "We judge the validity of the restriction in this case by the relation it bears to the general problem [Congress regulated] . . . not by the extent to which it furthers the Government's interest in the individual case." *Id.* at 430-31. Because granting Edge an as-applied exemption would have frustrated Congress' valid choice to accommodate the policies of lottery and non-lottery states, the Court rejected Edge's claim for a constitutionally-compelled exemption. *Id.* at 431-35.

As in *Lee* and *Edge*, granting WRTL an as-applied exemption on the facts of this case would subvert the statutory scheme this Court approved in *McConnell*, re-opening the loophole that BCRA closed. It would allow groups like WRTL and their corporate donors to pour millions and millions of dollars of corporate treasury funds into federal elections, so long as "magic words" were not used in the text. As *Lee* and *Edge* teach, an as-applied challenge must fail where, as here, it would wreak havoc on a valid statutory scheme.

CONCLUSION

For the above-stated reasons, the decision of the District Court should be reversed, and Appellees' application for an as-applied exemption from section 203 should be denied.

Respectfully submitted,

Burt Neuborne, *Counsel of Record*
Deborah Goldberg
David Gans
BRENNAN CENTER FOR JUSTICE
AT NYU LAW SCHOOL
161 Avenue of the Americas, 12th floor
New York, NY 10013
212-998-6730

Attorneys for *Amici Curiae*

Nos. 06-969 & 06-970

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Appellant*
v.
WISCONSIN RIGHT TO LIFE, INC., *Appellee.*

SEN. JOHN MCCAIN, *et al.*, *Intervenor-Appellants,*
v.
WISCONSIN RIGHT TO LIFE, INC., *Appellee.*

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING APPELLEES

THOMAS J. JOSEFIAK
Counsel of Record
SEAN CAIRNCROSS
REPUBLICAN NATIONAL COMMITTEE
310 FIRST STREET, S.E.
WASHINGTON, D.C. 20003
(202) 863-8500

March 23, 2007

Counsel for Amicus Curiae

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INTEREST OF THE AMICUS CURIAE

Amicus Republican National Committee ("RNC") is an unincorporated association that actively and extensively participates in campaigns and elections and public policy debate.[1] The RNC is the national organization of the Republican Party, and exists in large part to aid in fostering political debate and the exchange of ideas among its members and the public, and in expressing, promoting, and supporting its members' political beliefs and ideals with respect to public policy issues. In doing so, the RNC is subject to and complies with all applicable laws, regulations, and rules imposed by the federal government, including federal campaign finance law. The RNC will continue to engage vigorously in campaigns, elections, and public policy debate.

SUMMARY OF ARGUMENT

1. The District Court opinion, establishing an objective test for determining whether a communication constitutes an "electioneering communication" under the Bipartisan Campaign Reform Act ("BCRA") section 203 and recognizing an exemption for genuine issue advertisements, should be affirmed. D.C. Dist. Ct. Op., (04-1260, 2006). Issue advocacy constitutes core political speech, does not constitute federal election activity under BCRA, and thus rightly falls outside of BCRA's regulatory scope. Any test other than an objective, "bright line" standard used to distinguish issue advertisements from electioneering

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* made a financial contribution to the preparation or submission of this brief.

communications would unconstitutionally chill political speech in violation of the First Amendment.

2. Absent a bright line standard, any exemption to the electioneering communications regulation based upon the District Court's opinion will be subsumed, or fatally undermined, by the Federal Election Commission's ("FEC") increasingly broad, contextual, and subjective interpretation of express advocacy under 11 C.F.R. § 100.22(b). This expansive interpretation reaches far beyond the Court's First Amendment jurisprudence in this area. *See Buckley v. Valeo,* 424 U.S. 1 (1976); *Federal Election Comm'n v. Mass. Citizens for Life, Inc.,* 479 U.S. 238 (1986); *see also McConnell v. Federal Election Comm'n,* 540 U.S. 93 (2003). Groups engaging in issue advocacy will risk being caught between the FEC's expanding reading of express advocacy and its narrow reading of any issue ad exemption. The result: erratic enforcement and ambiguity for the speaker, chilling political speech.

3. Simply affirming the District Court's decision unconstitutionally elevates corporate and union speech above political party speech. Unaddressed in that decision is whether the issue ad exemption the court recognized for corporations and unions extends equally, or at all, to political parties. This Court has been clear that political parties may not be consigned to second-class status in the free speech arena. This Court should expressly extend any issue ad exemption equally to political parties.

ARGUMENT

I. Issue Advocacy Should Be Exempt From Federal Campaign Finance Regulation.

The RNC agrees with the District Court that Wisconsin Right To Life, Inc.'s ("WRTL") communications do not constitute either express advocacy or its functional equivalent and that no compelling governmental interest is served by regulating genuine issue advocacy. D.C. Dist. Ct. Op., (04-1260). Further, with respect to determining what constitutes express advocacy in this context, the RNC agrees with the District Court's reasoning that an objective test must be utilized to distinguish issue ads from regulated electioneering communications – or, in the District Court's words, that the "judiciary, in conducting First Amendment analysis, should not be in the business of trying to read any speaker's mind," and that anything less than an objective bright line standard in the speech context is "dangerous and undesirable," *Id.* at 18-20. Indeed, bright lines *foster* political debate because they allow speakers to fully engage in debate without being forced to "hedge and trim" out of fear. *See Buckley,* 424 U.S. at 43 (internal citations omitted).

The District Court's five-factor test examining the text and images of an ad is, insofar as it goes, an approach that will assist in providing speakers engaging in issue advocacy with a safe harbor. Clear, identifiable, and predictable standards are the only constitutionally adequate means by which to regulate in the free speech context. *See Buckley,* 424 U.S. 1; *Thomas v. Collins,* 323 U.S. 516 (1945). Currently, the only sure security against the amorphous and constantly-shifting regulatory scheme for such a speaker within the electioneering timeframe is keeping quiet; the District Court's test would be an improvement. Of course, the brighter such a line is, the greater speakers' abilities are

to engage in issue advocacy without fear. The District Court's opinion is thus an encouraging step for advocates; it does not, however, go far enough.

II. The FEC's Expanding Interpretation of Express Advocacy Threatens Any Issue Ad Exemption.

The FEC regulation defining express advocacy, 11 C.F.R. § 100.22, is two part. Section 100.22(a) identifies specific campaign slogans or words "which in context can have no other reasonable meaning than to urge the election or defeat" of one or more clearly identified federal candidates. Examples of such express advocacy are "Bill McKay in '94," "support the Democratic nominee," and "vote for the President" – straightforward words and/or slogans advocating election or defeat.[2] *Id.* Section 100.22(b) defines express advocacy as any communication that

> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or

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[2] Before the Court's decision in *McConnell*, 540 U.S. at 193, this was commonly referred to as the "Magic Words Test" – words that, on their face, clearly advocated the election or defeat of a federal candidate. Before BCRA's definition and restriction of electioneering communications, this test served as a constitutional bright line rule against which a communication could be measured, and served as a safe harbor for speakers conducting issue advocacy. Assuming "express advocacy and its functional equivalent" leaves room for genuine issue advocacy, it is incumbent upon this Court to tell speakers precisely when constitutionally protected issue advocacy crosses the line into "potentially corruptive" electioneering. Without such guidance, speakers are caught between risking liability for their speech and being forced to wait for a judicial or administrative approval of their speech, or both.

> defeat of one or more clearly identified candidate(s) because –
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

Section 100.22(b), although broader than 100.22(a), mirrors the judicial interpretation of "functional equivalency." That is, the section is designed to capture non-"magic words" express advocacy in an objective manner. *See McConnell,* 540 U.S. at 126-27, 194 n.78. Logically, in order to pass constitutional muster, 100.22(b) could not be any more expansive than this – and thus, a finding of express advocacy under this provision should require an objective link between the words and images contained in an ad and an identified federal candidate's fitness, or lack thereof, to hold public office. *See McConnell*, 540 U.S. 93; *see also McConnell v. Federal Election Comm'n,* 251 F.Supp. 2d 176, 796 (2003). In practice, however, 100.22(b) is expanding far beyond these limits, and creating precisely the sort of subjective and ambiguous test that the District Court in this case so clearly found to fail constitutionally.

The FEC has interpreted and applied section 100.22(b) subjectively, and has made clear its intent to continue to do so.[3] Such an approach by the FEC is squarely at odds with

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[3] The FEC recently began to deploy its subjective interpretation of section 100.22(b) in enforcement proceedings. *See* League of Conservation Voters 527, MUR 5753 (2006); MoveOn.org Voter Fund,

both the District Court's holding in this litigation and this Court's own First Amendment jurisprudence. *See Buckley,* 424 U.S. 1; *Mass. Citizens for Life, Inc.,* 479 U.S. 238; D.C. Dist. Ct. Op., (04-1260). Moreover, in practical application it destroys any issue ad exemption created here. That is, any issue ad varying one iota from the text, image(s), or context of the WRTL ads will be at risk of either (1) being deemed by the FEC to contain express advocacy under 100.22(b); or (2) failing to qualify for the genuine issue ad exemption.[4] For example, there is no guarantee that an ad using the precise WRTL language and images in a state that is deemed to have a more contested campaign than existed in Wisconsin; or a state that garners more national media attention, or has media markets that cover a greater area or reach a greater number of voters than Wisconsin's; or even a state with different demographics, will not be found to either constitute express advocacy or an electioneering communication. As such, no entity can confidently conduct issue advocacy without fear of incurring an enforcement proceeding, and a finding of violation, by the FEC. Far from

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MUR 5754 (2006); Swift Boat Vets and POWs for Truth *et al,* MUR 5525 (2006). Further, in the pending *Shays v. Federal Election Comm'n*, D.C. Dist. Ct. (1:06-cv-01247) litigation, the FEC is using the "breadth of section 100.22(b)" as a defense to plaintiffs' contention in that litigation that the FEC's coordination regulations are insufficient. *See* Def.'s Mem. in Supp. of Summ. J. and In Opp'n to Pl.'s Summ. J., at 48, *Id.* This leaves speakers caught between the FEC and the courts, with the inevitable result that speech will be curtailed out of caution and fear of governmental sanction.

[4] With respect to the latter, the danger created by the District Court's five-factor examination of the WRTL ads is that rather than creating a safe harbor, the District Court's clear intent, the opinion will be applied by the FEC in reverse – as the absolute furthest reach of the issue ad exemption. In order to assure speakers that their issue advocacy will be examined on its plain face, and thus extend full constitutional protection to core speech, at a minimum this Court should expressly identify the District Court's reasoning as a safe harbor for speakers.

being able to rely on a bright line standard or safe harbor, entities wishing to engage in issue advocacy would be forced to decide whether to seek an FEC advisory opinion blessing the ad script (and visuals) before it is broadcast, or risk FEC enforcement afterward (and perhaps mounting another as-applied challenge to such a decision).

Further, an issue ad exemption places such ads, by definition, outside the scope of BCRA's "federal election activity." As such, issue ads, at least with respect to national political parties – which operate exclusively with federally regulated dollars – should be exempted from the FEC's regulations on coordinated communications. 11. C.F.R. § 109 *et seq.* Without such an exemption (and even without any discussion taking place between a political party and the candidate or officeholder identified in the issue ad) a political party may be restricted from running an exempt issue ad because it might be deemed to have coordinated the communication with a federal candidate. Absent such a ruling, the exemption created to advocate issues outside the federal electoral context may be foreclosed by regulations that are intended to apply only to the federal electoral context.

Speakers deserve a clear answer as to what constitutes federally regulated activity. The sooner such guidance exists, the sooner core speech will be extended its full constitutional protection.

III. Simply Affirming the District Court Opinion Unconstitutionally Elevates Corporate and Union Speech Above Political Party Speech.

Exempting issue ads from regulation allows corporations and unions to speak freely on the public policy issues that impact upon their organizations and memberships. Such an

exemption would certainly come as welcome news to that identified segment of the regulated community. Unaddressed, however, is whether the RNC, any other political party, or any other political organization would be allowed to avail itself of such an exemption. This Court's jurisprudence, and common sense, dictates that political parties should be included in any such exemption.

Indeed, if any issue ad exemption exists at all, it ought to apply first to political parties. The RNC, as a national political party regulated by The Federal Election Campaign Act ("FECA"), is already the subject of one of the most extensive regimes of federal regulations in America. 2 U.S.C. § 431 *et seq.* Every dollar that the RNC raises or spends is subject to FECA's source and amount restrictions, disclosed on publicly available federal reports, and compliant with FECA's rules and restrictions as to how, when, and where it may be spent.[5] No such restrictions attach to the parties that expressly benefit from the issue ad exemption under the District Court's opinion. Yet, campaign finance law first grew from concern over corporate dollars flowing into federal elections, manifesting in the Tillman Act of 1907, 34 Stat. 864 (1907). It is nonsensical to argue that there exists a compelling governmental interest in regulating national political party speech as it relates to issue advocacy where no such interest exists with respect to corporations or unions. This is only underscored by the Court's own campaign finance jurisprudence, which has always viewed restrictions on political expenditures as

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[5] The RNC's dollars, already fully regulated by federal law, are also subject to individual state law regulation where the RNC chooses to expend any funds on elections that do not include any federal candidate. For example, should the RNC participate in the upcoming 2007 Kentucky, Louisiana, or Mississippi gubernatorial races – elections in which no federal candidate will appear on the ballot – the RNC's funds will be subject to dual regulatory regimes.

deserving closer scrutiny than restrictions on contributions. *See Buckley,* 424 U.S. at 14-23; *Randall v. Sorrell,* 126 S.Ct. 2479 (2006); *Federal Election Comm'n v. Colo. Republican Fed. Campaign Comm.,* 533 U.S. 431 (2001), 533 U.S. at 440-441; *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 386-388 (2000). Such scrutiny should only increase where, as here, the speech is by definition unrelated to federal election activity. This Court made clear in *Colo. Republican Fed. Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604 (1996), that a political party may not be relegated to second-class status with respect to political speech. *Id.* at 616. It simply cannot be the case that a genuine issue ad run by a corporation or union is somehow transformed into an electioneering communication merely because it is spoken by the RNC, or any other political party.

Political parties, unlike corporations and unions, exist to further their constituents' political philosophy, ideals, and goals. Participating in elections and supporting candidates is only one way by which a political party fulfills this function – but it is only one way. Promoting its members' political philosophy, and developing and evolving such philosophy through active debate and exchange of ideals are other equally important, if not more so, ways. A party's ability to attract new members and further its philosophy is fundamentally reliant on its ability to engage in issue advocacy. It is difficult to imagine President Reagan's party biting its nails over whether or not a communication denouncing communism would fall within a technical definition of electioneering. Under the FEC's ever-evolving application of BCRA, however, this is the reality.

Moreover, BCRA's absolute ban on national political party involvement with any non-federal funds whatever makes no allowance for either purely non-federal or even, as is the case here, *non-election related* activity. Issue ads that

fall wholly outside the scope of federal campaign finance regulation – ads that may be funded by unlimited amounts of corporate or union general treasury dollars -- still must be paid for by federal funds if they are run by a national political party. Put simply, in the context of the speech at issue here, there is neither reason nor constitutional justification to treat national political parties differently than any other speaker.[6]

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[6] Further, outside the coordination timeframes set forth in 11 C.F.R. § 109 *et seq.*, corporations and unions may coordinate with federal candidates using such unregulated money. National political parties, however, are absolutely prohibited from any such "non-coordination coordination" due to BCRA's absolute ban on their "receiving, directing, soliciting, or spending" any non-federal dollars. This places a further limitation on political party speech relative to corporate and/or union speech that bears no conceivable relation to eradicating corruption or the appearance thereof – the only two governmental interests this Court has found to be compelling enough to draw such a line.

CONCLUSION

For the reasons set forth above, *amicus* RNC respectfully urges this Court to affirm the District Court and create an exemption for genuine issue ads from electioneering communications; to establish a bright line standard with respect to express advocacy; and expressly include political parties' in any issue ad exemption.

Respectfully submitted,

THOMAS J. JOSEFIAK
Counsel of Record
SEAN CAIRNCROSS
REPUBLICAN NATIONAL
COMMITTEE
310 FIRST STREET, S.E.
WASHINGTON, D.C. 20003
(202) 863-8500

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Counsel for Amicus Curiae